

Ottawa, Friday, April 24, 1998

File No.: PR-97-033

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

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

### DETERMINATION OF THE TRIBUNAL

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

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

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian  
International Trade Tribunal awards IBM Canada Ltd. its reasonable costs incurred in relation to filing and  
proceeding with the complaint.

Charles A. Gracey

Charles A. Gracey  
Member

Michel P. Granger

Michel P. Granger  
Secretary

Date of Determination: April 24, 1998

Tribunal Member: Charles A. Gracey

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: John Syme

Complainant: IBM Canada Ltd.

Counsel for the Complainant: Ronald C. Lefebvre

Government Institution: Department of Public Works and Government Services

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IN THE MATTER OF a complaint filed by IBM Canada Ltd. 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*.

## FINDINGS OF THE TRIBUNAL

### INTRODUCTION

On December 11, 1997, IBM Canada Ltd. (IBM) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement (Solicitation No. 46577-7-0345/B) by the Department of Public Works and Government Services (the Department) of data warehouse servers for the Department of National Revenue (Revenue Canada).

IBM alleged that the reasons given by the Department and Revenue Canada for finding its proposal technically non-compliant on three mandatory requirements are invalid. It alleged that its technical proposal was evaluated, not on the basis of the requirements of Sections 4.3, 5.2.1 and 5.13.6 of Appendix "A," Technical Specifications, of the Request for Proposal (RFP), but on requirements that were not set out in those sections nor anywhere else in the RFP. This, IBM alleged, constitutes a breach of Article 506(6) of the *Agreement on Internal Trade*<sup>2</sup> (AIT), which requires that evaluation criteria be clearly identified in the tender documents.

IBM went on, in its complaint, to request as a remedy that its proposal be re-instated and that the Department proceed to complete the evaluation process. It also requested that the Tribunal order the Department to stop the award of any contract in this procurement until its proposal has been properly and fully evaluated. In the alternative, if a contract has already been awarded and if it turns out, after fair evaluation, that IBM had the best proposal, IBM suggested that the contract be repatriated and awarded to IBM or that Revenue Canada pay compensation to IBM for the lost opportunity, possible damages to its reputation and the expenses related to filing and proceeding with its complaint.

On December 15, 1997, 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*<sup>3</sup> (the Regulations) had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into the complaint.

On December 16, 1997, the Tribunal issued an order, pursuant to subsection 30.13(3) of the CITT Act postponing the award of any contract in relation to the subject procurement until the Tribunal determined the

1. R.S.C. 1985, c. 47 (4th Supp.).
2. As signed at Ottawa, Ontario, on July 18, 1994.
3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547 as amended.

validity of the complaint. On December 18, 1997, the Department informed the Tribunal that a contract had been awarded to Hewlett Packard (Canada) Ltd. on December 10, 1997. On February 10, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On March 2, 1998, IBM filed its response to the GIR with the Tribunal. On March 11, 1998, the Department filed comments on IBM's comments and on March 18, 1998, IBM filed 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 May 20, 1997, the Department received from Revenue Canada a requisition for the purchase of two UNIX servers to support the development<sup>5</sup> and production<sup>6</sup> environments which, in turn, serve its income tax auditors. On May 30, 1997, a Letter of Interest was published on the Open Bidding Service (OBS) and in *Government Business Opportunities* (GBO) to advise potential bidders that a draft document was available to them for review and comments prior to the formal release of the RFP. Following amendments to the requirement definition resulting from industry comments, a Notice of Proposed Procurement and the RFP were posted on the OBS and the GBO on August 29, 1997, with a closing date of October 10, 1997.

The RFP includes, in part, the following:

### **D EVALUATION PROCEDURE**

- D.1 The specifications and other requirements are categorized as either "MANDATORY", "DESIRABLE", or "INFORMATION". In the case that a mandatory item cannot be complied with, the proposal will not receive further consideration. When an item is considered mandatory, it will be identified specifically with the word "MANDATORY" or "ESSENTIAL". Furthermore, the words "shall", "must" and "will" herein are to be interpreted as MANDATORY requirements. Vendors must respond to all parts of the RFP. Proposals which are only partially responsive will be rejected.

## **TECHNICAL SPECIFICATIONS, Appendix A**

### **1. INTRODUCTION AND INFORMATION**

#### **1.1 Definitions**

Information

The following definitions apply solely to this Request for Proposal. Revenue Canada requires all bidders to accept these definitions as interpretations of industry terminology.

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4. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.
  5. Exists to create and test Database/Data Warehouse applications to be subsequently installed on the production server.
  6. Contains historical tax and tax-related data used by Revenue Canada's auditors in the performance of their day-to-day responsibilities.

### 1.1.1 SMP

Symmetric Multi-Processing Architecture, evenly distributes all of the processing tasks across all CPUs. This way, each processor does an equal amount of work independent of the mix of applications. For the purposes of this RFP Revenue Canada will use the SMP acronym to mean a tightly coupled multi-processor system, in which a common memory is shared among all processors.

## **3.2 Configuration**

Proposed solutions must be scaleable from the initial proposed configuration to those used in the TPC-D. [Transaction Performing Processing Council] benchmark without discarding any of the initial components.

## **3.3 TPC-D**

The vendor should have performed a TPC-D benchmark, on the proposed SMP platform or a loosely coupled/clustered SMP platform, running UNIX operating system, at a minimum of 100GB level, with one of the four databases identified in article 5.10.

## **4. CONFIGURATION**

### **4.3 Development Server Configuration**

Mandatory

Base Development System Configuration must be identical system as the Initial Production Server with the following components: (exceptions)

- minimum of 2 SMP Processors
  - Operating at a minimum speed of 166 MHz.
  - Scaleable to 4 SMP processors, within the same chassis
- minimum of 128 MB ECC [Error Correcting Code] or JEDEC RAM

## **5. TECHNICAL REQUIREMENTS**

Mandatory

### **5.1 System Board**

Mandatory

#### 5.1.3

Mandatory

The proposed system board must support a minimum of two microprocessors running in Symmetric Multi-Processing (SMP) mode.

#### 5.1.6

Desirable

Please indicate your commitment to support full 64-bit architecture and state when.

### **5.2 Processor**

#### 5.2.1

Mandatory

The proposed system must be one of the following categories of 64 bit processors: RISC, PA-RISC, SPARC, UltraSPARC, PowerPC, or INTEL/CISC arranged in a Symmetrical Multi-Processing configuration.

### **5.6 Operating System**

#### 5.6.11

Desirable

Please indicate your commitment to support full 64-bit operating system and state when.

### **5.13 Backup Storage SubSystem**

5.13.6

Mandatory

The total infrastructure must be capable to backup a minimum of 50GB of uncompressed data per hour, and incrementally scale up to a minimum optional capacity of 150GB of uncompressed data per hour. (end-to-end)

## **SELECTION & EVALUATION METHODOLOGY, Appendix B**

### **4. Marking of Requirements**

#### **4.1 Mandatory Requirements**

**A PROPOSAL MUST COMPLY WITH ALL THE MANDATORY REQUIREMENTS. ANY PROPOSAL WHICH DOES NOT MEET ALL THE MANDATORY REQUIREMENTS WILL IMMEDIATELY BE DECLARED NON-RESPONSIVE AND WILL NOT BE CONSIDERED FURTHER.**

During the bidding period, the Department issued eleven amendments in the form of RFP updates to respond to questions received from suppliers and, in one case, to extend the RFP closing date. Update No. 009 in part, amended Section 3.2 of Appendix "A" to the RFP by deleting the words "without discarding any of the initial components." The RFP closed on October 24, 1997. According to the Department, five proposals were received, including one from IBM.

In respect of the items in dispute, the IBM proposal reads, in part, as follows:

#### **4.3 Development Server Configuration**

The proposed development server is an IBM RS/6000 Model H10, which is a rack-mounted 604e SMP offering binary compatibility with the production R50 and is configured as follows:

- 2 SMP processors
- operating at a speed of 166 MHz
- processor upgrades available in the same chassis

Please refer to ANNEXE D for full details of our configuration with no prices

5.2.1

COMPLY

IBM is pleased to bid a system based on the PowerPC microprocessor. The latest implementation of the PowerPC chip is the RS64, which is 64 bit implementation. Please refer to Annex D for further details.

5.13.6

COMPLY

The total infrastructure is capable of backing up 90GB of uncompressed data per hour on a 5 drive system, and incrementally scales up to 216GB of uncompressed data per hour in the same chassis. Of course more chassis could be added for even further scaling. (see Annex E-A97-1256)

On October 31, 1997, the Department submitted a list of clarification questions to IBM. IBM responded to the Department's questions on November 5, 1997, which reads, in part, as follows:

**Department's question: 4.3:** Please direct us to reference material or commercially available information provided with the proposal that confirms the proposed IBM RS/6000 H10 SMP server is in fact upgradable to a minimum of 4 SMP processor.

**IBM Response:** The proposed IBM/6000 Model H10 is scaleable to 4 SMP processors within the same chassis. The Revenue Canada requirement is to provide a system that can scale up to 4 SMP processors. A chassis is defined as per section 5.27: **Rack Mountable Characteristic is a "rack chassis"**.

IBM offers three possible upgrade paths to provide the required 4 SMP processor configuration:

1. add an additional H10 processor drawer into the same chassis.
2. upgrade the H10 to a model R50.
3. upgrade the H10 to a model H50.

**Department's question: 5.2.1:** Please direct us to reference material or commercially available information provided with the proposal that confirms that the PowerPC 604e processor used in the proposed RS/6000 R50 SMP server is in fact a 64 bit processor.

**IBM Response:** IBM proposed the 604e PowerPC microprocessor in a model R50 which is part of the IBM RISC processor family able to be upgraded to a 64-bit PowerPC RS64 processor. The PowerPC category of processors allow the upgrade to a 64 bit.

Our bid includes the PowerPC RS64 as an option, and we strongly believe that our present R50 PowerPC 604e processor will provide the price performance scalability and TPC-D performance requirements stated in the RFP.

**Department's question: 5.13.6:** Please direct us to reference material commercially available information provided with the proposal that clarifies how 2 proposed DLT7000 drives have the throughput or capacity to backup a minimum of 50GB of uncompressed data per hour.

... how 5 proposed DLT7000 drives have the throughput or capacity to backup a minimum of 150GB of uncompressed data per hour.

**IBM Response:** The proposed "total infrastructure" includes 1x1-drive model and 2x2-drive models for a backup capability of 90GB per hour of uncompressed data using 5 drives. That is  $(1 \times 18) + (2 \times 36) = 90$ GB per hour.

Further, 5.13.6 states "incrementally scale up to a minimum optional capacity of 150GB of uncompressed data per hour". This optional capacity would be achieved by adding more tape libraries/drives. Specifically, adding a 3rd 2-drive model would allow for a capacity of 162GB per hour  $(1 \times 18 + 3 \times 36 = 162)$ GB/hour. As the requirement clearly states, 150GB/hour capacity is an optional/additional requirement to the "total infrastructure" and thus was not bid as part of the "total infrastructure".

On November 20, 1997, the Department informed IBM that its bid had been found non-compliant with three mandatory requirements of the RFP, namely, Section 4.3 of the Technical Specifications (Development Server Configuration), Section 5.2.1 (Processor) and Section 5.13.6 (Backup Storage Subsystem - Total Infrastructure). At the request of IBM, on November 25, 1997, the Department met with

IBM and Revenue Canada to hear IBM's objections. On November 27, 1997, the Department informed IBM, in writing, that it was maintaining its conclusion that IBM's proposal was non-compliant with the above-mentioned mandatory requirements.

## **VALIDITY OF THE COMPLAINT**

### **IBM's Position**

IBM submits that the Department has, in the GIR, misrepresented the nature of its complaint. IBM is not arguing, as the Department contends, that the criteria used to evaluate the bids should have differed but, rather, that the criteria used to find IBM's proposal technically non-compliant in three instances were not those set out in the tender documents.

Concerning Section 4.3 of the Technical Specifications (Development Server Configuration), IBM submits that, contrary to Revenue Canada's position set out in the evaluation form sent to IBM on November 20, 1997, there was nothing in the RFP, including Update No. 009, prohibiting bidders, when upgrading the products offered, to completely replace the original development server. As well, IBM submits that the product which it offered, one system board for two SMPs, Model H10, and another system board for two other SMPs, could be fitted within a single chassis when the need to do so arose. On the question of the tight coupling of the processors, IBM submits that the RFP required a multiprocessor system and not multiple processors. A system is made up of components and, within each of the components that IBM proposed, there would have been "tight coupling" and a common memory. But the two units would have been loosely coupled. Moreover, IBM submits that the upgrade paths involving its R-50 and H-50 models would have provided a tightly coupled environment. However, Revenue Canada chose to dismiss these models claiming that they were not 64-bit processors. But, IBM submits, the requirement in the RFP was not for a 64-bit processor but for a category of 64-bit processor which, in the opinion of IBM, means a 32-bit processor capable of being upgraded to a 64-bit one.

Concerning Section 5.2.1, of the Technical Specifications (Processor), IBM submits that the Department's reason, i.e. the complete replacement of the original production server, is invalid because, subsequent to the issuance of Update No. 009, complete replacement was no longer prohibited under the RFP. Concerning the PowerPC 604e processor offered by IBM and the fact that it does not meet the 64-bit requirement, IBM submits that the only requirement in Section 5.2.1 is that "[t]he proposed system must be one of the following categories of 64-bit processors." In this context, IBM states that its PowerPC is a category of 64-bit processors, that it is in the family of 64-bit processors and that it is capable of being upgraded to a 64-bit one. What was required under the RFP, IBM submits, was a 32-bit processor with a 64-bit "capacity," arranged in a symmetrical multi-processing configuration. This is what IBM offered. IBM also submits that the inference made by Revenue Canada in reference to Sections 5.1.6 and 5.6.11 of the RFP in its memorandum dated November 27, 1997, to the Department, concerning Revenue Canada's intent to acquire a 64-bit microprocessor, is without foundation. In fact, rating points were awarded in each of these sections for the speed with which suppliers would be capable of scaling up to a 64-bit architecture and operating systems. This, in IBM's view, is proof that a 64-bit processor was not a mandatory requirement.

Concerning Section 5.13.6 of the RFP (Backup Storage Subsystem - Total Infrastructure), IBM submits that the requirement for a backup capacity of 50GB per hour of uncompressed data cannot be found in Section 4.1 (Initial Production Server Configuration) of the RFP. Similarly, the requirement for a backup



capacity of 150GB per hour of uncompressed data cannot be found in Section 4.2 (Final Production Server Configuration) of the RFP. IBM submits that the only section of the RFP which deals with the matter of the GB per hour of backup capacity is Section 5.13.6 which states that the “total infrastructure” must be capable to back up certain amounts of uncompressed data per hour. Though the Department insists that the “total infrastructure” is the initial production server, IBM submits that the “total infrastructure” can only be made up of the initial production server, the final production server and the development server system components. IBM submits that what Revenue Canada appears to have wanted is a backup capacity of a minimum of 50GB of uncompressed data per hour in the initial production server configuration and a backup capacity of a minimum of 150GB of uncompressed data per hour in the final production server configuration. IBM submits that what Revenue Canada sought in Section 5.13.6 was a “total infrastructure” which, when all is in place, would be capable of backing up a minimum of 50GB per hour of uncompressed data. According to IBM, the same “total infrastructure,” once in place, was to be capable of incrementally scaling up, as an option, to a minimum backup of 150GB per hour of uncompressed data. In conclusion, IBM submits that there is nothing in the RFP that requires the Final Production Server Configuration to back up 150GB per hour of uncompressed data and there is nothing in the RFP that requires the “total infrastructure” to back up 150GB per hour of uncompressed data. What is required in Section 5.13.6 of the RFP is that the “total infrastructure” be capable of supporting 50GB per hour and be capable of incrementally scaling up to a minimum optional capacity of 150GB per hour of uncompressed data, as and if Revenue Canada saw the need for it and ordered the optional equipment required to achieve what is referred to in Section 4.4 of the RFP. IBM submits that its proposal did exactly that.

According to IBM, Revenue Canada is of the view that IBM understood what was required in the RFP, that it knew that it did not have the required equipment, that it proceeded to offer products that did not meet the requirements and that it is now trying to “bully its way in the back door” by finding fault with a tender document that is completely unassailable. In this context, IBM asserts that serious enterprises, such as itself, do not spend money putting together proposals for products which they do not have or services that they do not provide, nor do serious enterprises lodge complaints lightly with the Tribunal. Concerning the Department’s submission that IBM should have availed itself of the opportunity to request clarification during the bidding period and that only IBM, of all bidders, interpreted the RFP as it did, IBM submits that no clarification was sought because the RFP is clear to IBM in respect of the points in dispute.

In its final comments of March 18, 1998, IBM submits that it is clear from the GIR that there is a notional difference between what the Department now indicates it wanted and what it asked for in the RFP. In addition, IBM submits that the benchmark requirements in Sections 3.2 and 3.3 do not relate to the production server only, but to the performance and configuration of the overall solution. Further, IBM indicates that it is puzzled as to why Revenue Canada raises these points since its proposal was found compliant on these requirements. In respect of Sections 5.1.6 and 5.6.11 of the RFP, IBM submits that the wording of these provisions do not support the contention that what was immediately required by Section 5.2.1 was a 64-bit processor. On the contrary, the words in these sections gave every reason to believe that what was sought was an evolutionary system that would see the solution start with a 32-bit processor that would, at some point, grow into a 64-bit processor.

### **DEPARTMENT’S POSITION**

The Department submits that it understands IBM’s position to be that the evaluation criteria should have differed from those set out in the RFP. The Department submits that it is not required to frame its

evaluation criteria in such a manner as to suit the products of a potential supplier. Rather, the issue is for the Department to demonstrate that IBM's bid was evaluated according to the criteria set out in the RFP and that IBM's bid was non-compliant on that basis.

Dealing first with Section 4.3 of the Technical Specifications, the Department submits, citing numerous excerpts from the RFP in support, that Revenue Canada's requirement was for a development server with 2 SMP processors, upgradable to 4 SMP processors, within the same chassis in a tightly coupled multi-processor arrangement. In this configuration, all the SMP processors would share the same memory equally to accomplish their programmed tasks. The Department submits that the solution offered by IBM, in its bid, including the three upgrade paths in its clarification, failed to meet this mandatory requirement. The addition of another H10 processor drawer into the same chassis would result into loosely coupled multiprocessors, each with its own dedicated memory and its own copy of the operating system. The processors would not share a common memory and would require an additional control program and communication link between them.

Concerning the upgrades to an IBM RS6000, Model R50, this solution does not meet the requirements of Section 5.2.1 for a 64-bit microprocessor. In addition, the Department submits that, in order to upgrade the 32-bit PowerPC 604e microprocessor to a 64-bit microprocessor, IBM had to propose its IBM RS/6000 Enterprise, Model S70. However, this latter model fails to meet the 166 MHz minimum speed requirement, as the 64-bit PowerPC RC64 microprocessor contained in Model S70 operates at a speed of only 125 MHz. Concerning the upgrade to a model H50, this approach too is unacceptable as it fails to meet the requirements of Section 5.2.1 of the Technical Specifications for a 64-bit microprocessor. In addition, the Department submits that the fact that the H50 is available only via special bid indicates that the H50 was not commercially available, off-the-shelf technology at the time of bid closing, as required by Section 2.6(1) (Inspection and Certification) of Section 2 of Appendix "A" of the RFP. Concluding on this point, the Department submits that it properly evaluated IBM's offer on this section as non-compliant.

Concerning Section 5.2.1 of the Technical Specifications, the Department submits that both Models H10 and R50, proposed by IBM as the development and production servers respectively, contain the 32-bit PowerPC 604e microprocessor and not the 64-bit microprocessor required in Section 5.2.1. Insofar as the 64-bit PowerPC RS64 microprocessor is concerned, the Department is of the view that it was not offered by IBM in its proposal, but merely mentioned as a potential upgrade configuration.

Concerning Section 5.13.6 of the Technical Specifications, the Department submits that IBM clearly understood Revenue Canada's requirements in relation to the "total infrastructure" in that it proposed in its offer both an initial and a final configuration for the proposed system. However, the initial solution (one IBM 7337 digital linear tape library with 2 DLT7000 tape drives for a combined throughput rate of 36GB of uncompressed data per hour) does not meet the mandatory requirements of Section 5.13.6 "to backup a minimum of 50GB of uncompressed data per hour." The final solution (three 7337 digital linear tape library with 5 DLT7000 tape drives for a combined throughput rate of 90GB of uncompressed data per hour) also does not meet the mandatory requirements of Section 5.13.6 to scale "up to a minimum optional capacity of 150GB of uncompressed data per hour (end-to-end)."

For the above reasons, the Department submits that IBM's complaint should be dismissed and it requests the costs of defending this complaint.

In its comments on IBM's comments on the GIR, the Department denies that it has misrepresented IBM's complaint. The Department submits that IBM had complete control when it drafted its proposal. Therefore, if the system which it proposed failed to meet the evaluation criteria in the RFP, IBM shall not now be permitted to seek a conclusion from the Tribunal that the evaluation criteria should have been amended.

In relation to the benchmark results referred to in Sections 3.2 and 3.3 of the Technical Specifications, the Department submits that Section 3.2 of the Technical Specifications is a mandatory requirement which addresses only the initial production server environment. In this context, the Department submits that the fact that Section 3.3 of the Technical Specifications (a desirable requirement) mentions a loosely-coupled/clustered SMP platform does not permit an interpretation that this reference has eliminated the mandatory requirement related to the development server environment.

Moreover, the Department submits that, if it wished to acquire an upgradable 32-bit processor, it would have requested one. Instead, it submits that it requested a 64-bit processor, as clearly provided in Section 5.2.1 of the Technical Specifications. The fact that IBM refers in its proposal to processors with 64-bit "capacity" changes nothing to what is required in Section 5.2.1. Further, in respect of Sections 5.1.6 and 5.6.11, the Department submits that references to desirable characteristics of the proposed system do not permit an interpretation that a rated requirement has eliminated a mandatory requirement.

### **TRIBUNAL'S DECISION**

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limits 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.

Essentially, IBM alleged that the reasons given by Revenue Canada for finding its proposal technically non-compliant with three mandatory provisions are invalid, in that these reasons are not based on what was required by the relevant provisions of the RFP.

Section 506(6) of the AIT provides, in part, that 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."

According to Revenue Canada's bid evaluation report, IBM's proposal was found non-compliant with Section 4.3 (Development Server Configuration) of Appendix "A" of the RFP for the following reasons:

Reference material or commercially available information provided with the proposal that confirms the proposed IBM RS/6000 H10 SMP server is in fact upgradable to a minimum of 4 SMP processor was unacceptable. Revenue Canada's specification of "within the same chassis" does not include proposals that are scaleable only within the same "rack chassis" by adding a second RS/6000 H10. Secondly, upgrading from RS/6000 to a different model (i.e. RS6000 R50 or H50) is also considered unacceptable, since this will completely replace the original development server. Revenue Canada deems this proposal non-compliant.

Dealing with the second stated reason first, the Tribunal notes that the requirement that original material not be completely replaced when scaling up was withdrawn through Update No. 009 of the RFP. Accordingly, IBM's upgrade proposals for the development server to model RS6000 R50 or model RS6000 H50 cannot be found non-compliant on this basis.

As for the first reason, the Tribunal notes that the terms "chassis" and "rack chassis" are not defined in the RFP. However, a careful reading of all documents suggest to the Tribunal that the real issue here has to do with whether the systems proposed are "tightly coupled" or "loosely coupled." In the opinion of the Tribunal, Section 1.1.1 of the RFP clearly establishes that the development and production servers offered had to be a tightly coupled multi-processor system, in which a common memory is shared among all processors (emphasis added).

It is clear from the record that IBM offered three pathways to accomplish the required upgrade of the RS6000 H10 model which it initially proposed as the development server. The first of these pathways consisted in adding an additional H10 to the one proposed in the first instance. This, however, would result in the co-existence of two tightly coupled H10s not sharing a common memory. IBM has argued that Section 3.3, which concerns the running of benchmark tests, opens the door to loosely coupled systems. The Tribunal recognizes that there might exist an element of ambiguity in Section 3.3. However, considering the very clear wording of the term SMP in Section 1.1.1. of the RFP and the fact that Section 3.3 is a desirable requirement only and that it concerns primarily benchmark tests, the Tribunal is of the opinion that the reference to a loosely coupled SMP platform in Section 3.3 cannot be interpreted to negate the mandatory requirements set out in Sections 1.1.1 and 4.3 of the RFP for a tightly coupled system.

For these reasons, the Tribunal determines that Revenue Canada's decision is consistent with the wording in the tender documents. In the opinion of the Tribunal, in this instance, being within the same rack chassis does not suffice to create a tightly coupled configuration within the meaning of Section 1.1.1 of the RFP. However, the evaluation report is silent on IBM's upgrade paths two and three. This matter is addressed below.

According to the bid evaluation report, IBM's proposal was found non-compliant in respect of Section 5.2.1 (Processor) of Appendix "A" of the RFP for the following reasons:

Revenue Canada is asking that proposed systems must be one of the following stated categories of 64 bit processors: RISC, PA-RISC, SPARC, UltraSPARC, PowerPC, or INTEL/CISC. Your PowerPC 604e processor meets the mandatory criteria as one on the stated processors, but does not meet the 64[-]bit processor requirement as stated in the statement of work. Your upgrade path via the RS64 option does not meet Revenue Canada's requirement, since it will completely replace the original production server to a RS/6000 S/70 in order to achieve 64[-]bit capability. Revenue Canada deems this proposal non-compliant.

Dealing again with the second stated reason first, the Tribunal determines that this reason is not valid as, following the issuance of RFP Update No. 009, nothing in the RFP prohibited the complete replacement of the initial production server.

Concerning the first reason, the Tribunal has difficulty understanding the precise meaning of Section 5.2.1. After stating that "[t]he proposed system must be one of the following categories of 64[-]bit processors," the section then list a series of processors, e.g. RISC, INTEL/CISC and PowerPC, some of which were known to the Department and Revenue Canada to be 32-bit processors at the time the RFP was

issued. In explaining this ambiguity, the Department submitted that the specification was written this way to allow technological development until the last minute, i.e. bid closing, thereby keeping the requirement open to broader competition. The Tribunal is not satisfied with this explanation. Indeed, in the opinion of the Tribunal, no qualifying technology would have been excluded from the competition had Section 5.2.1 simply and clearly stated that the requirement was for 64-bit microprocessors.

Another possible interpretation, the one advanced by IBM, is that what the Department and Revenue Canada were prepared to accept under Section 5.2.1 were processors that were 64-bit ones or 32-bit processors with a “capacity” to be upgraded to 64-bit ones. IBM suggests that, if the Department only wanted 64-bit processors, it could have easily set that out in the RFP. For its part, the Department submits that, if it wanted 32-bit processors capable of being upgraded to 64-bit ones, it would have been easy to establish that requirement. The fact of the matter is that the Department used in the RFP the expression “one of the following categories of 64[-]bit processors” immediately followed by a listing of 64-bit and 32-bit processors.

The Tribunal is of the view that Sections 5.1.6 and 5.6.11 lend support to IBM’s interpretation. In so doing, the Tribunal is not suggesting that a desirable requirement can supplant a mandatory requirement. However, the Tribunal is of the view that these clauses support IBM’s interpretation of Section 5.2.1 that, as a minimum, the processors that it offered had to be upgradable, over time, to 64-bit ones. This is what IBM offered and, in the circumstances, the Tribunal finds IBM’s interpretation reasonable. It must be recalled that the Department wrote the specifications. Bidders that construe such specifications reasonably should not be penalized for a latent ambiguity introduced, albeit inadvertently, by the Department and/or Revenue Canada.

In addition, IBM maintains that it submitted in its proposal, admittedly as an option, its PowerPC RS64 model which, it states, is a 64-bit implementation. Revenue Canada concluded, in respect of this offering, that the upgrade path via the RS64 option failed to meet its requirements since it would completely replace the original production server. As indicated earlier, no such prohibition existed at the time of bid closing. Consequently, the Tribunal concludes that, in respect of the reasons documented in Revenue Canada’s bid evaluation report, no basis subsists on which Revenue Canada might declare IBM’s proposal non-compliant with Section 5.2.1 of the RFP.

According to the bid evaluation report, IBM’s proposal was found non-compliant in respect of Section 5.13.6 (Backup Storage Subsystem - Total Infrastructure) of Appendix “A” of the RFP for the following reasons:

Revenue Canada’s requirement in the initial proposed configuration as defined in Section 4.1 is to backup 50GB/HR of (uncompressed data). As per your response on page 58, section 8.2, you proposed 2 DLT7000 drives, which only supports 36GB/HR (uncompressed). This clearly does not meet Revenue Canada’s initial requirement. Therefore, this proposal is deemed non-compliant. Revenue Canada plans to optionally purchase infrastructure components up to the final proposed configuration as defined in Section 4.2. This final configuration must back up 150GB/HR (uncompressed). On page 59, section 8.2, you proposed 5 DLT7000 drives which only support 90GB/HR (uncompressed). This clearly does not meet Revenue Canada’s final requirement. Therefore, this proposal is deemed non-compliant.

The Tribunal observes that there is no requirement stated in Section 4.1 that the initial production server be capable of backing up 50GB of uncompressed data per hour. Similarly, there is no requirement in Section 4.2 that the final production server be able to back up 150GB of uncompressed data per hour. IBM

interpreted Section 5.13.6 of the RFP to mean that the proposed system had to be capable of backing up a minimum of 50GB of uncompressed data per hour and, on an optional basis, at Revenue Canada's later discretion, be capable of incrementally scaling up to 150GB of uncompressed data per hour. IBM submits that it met this requirement, in that the final configuration that it offered is capable of processing 90GB of uncompressed data per hour and is upgradable, on an optional basis, to 216GB of uncompressed data per hour. The Tribunal finds that, here again, the RFP is ambiguous in that it introduces an undefined term, "Total Infrastructure," which lends itself to more than one reasonable interpretation. The Tribunal finds IBM's interpretation of Section 5.13.6 reasonable in the circumstances. As well, considering that Sections 4.1 and 4.2 of the RFP include no requirements whatsoever relative to the production system's initial or final capability to back up uncompressed data, the Tribunal determines that this reason for declaring IBM's proposal non-compliant is also not valid.

It is now apparent that none of the reasons described in Revenue Canada's bid evaluation report hold completely or at all. Therefore, the Tribunal determines that, but for the first upgrade pathway for the development server which is loosely coupled, the reasons documented in the Revenue Canada bid evaluation report for declaring IBM's proposal non-compliant are not valid. The Tribunal is also of the view that the Department and Revenue Canada erred in declaring IBM's proposal non-compliant on all these points in that, to do so, they used criteria not clearly stated or not stated at all in the RFP. This is a breach of the provisions of Article 506(6) of the AIT and, therefore, the complaint is valid.

The above determination, however, does not equate to a determination by the Tribunal that IBM's proposal is compliant in all respects. Indeed, the Department, in the GIR and in its comments on IBM's response to the GIR, invoked possible new reasons for finding IBM's offer non-compliant, e.g. the 125 MHz versus 166 MHz issue related to the IBM RS6000 Enterprise Model S70 proposed by IBM as its second upgrade pathway for the development server or the not "off-the-shelf" characterization of Model H50 offered by IBM through special bid as its third pathway to upgrade the development server or the benchmark tests issue. It is nevertheless apparent, now, that the reasons for declaring IBM's offer non-compliant were not only invalid for the most part but, in addition, were either not fully documented in the bid evaluation report or, in the opinion of the Tribunal, more likely, IBM's proposal was not thoroughly evaluated by Revenue Canada and the Department at the time of bid evaluation. In the opinion of the Tribunal, this is a serious procedural breach, one which could have been repaired by recommending that the Department re-evaluate IBM's offer thoroughly and consistently with the terms of the RFP. However, a contract has been issued and substantially performed. Nevertheless, IBM was entitled to a fair and complete evaluation of its proposal. In consideration thereof, it accepted to risk resources related to the formulation of a proposal. It is clear to the Tribunal that IBM, being deprived of a fair evaluation, has been aggrieved by the costs of its proposal, not to mention the loss of the possibility to be declared compliant and, should this be the case, of a probability to be the winning bidder and have the opportunity to profit from this award. However, only IBM's costs related to bid preparation are known for certain and, therefore, the Tribunal, with a view to placing IBM back into the position it was before this procurement occurred, awards IBM its reasonable costs related to the preparation of a response to this solicitation.

#### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was not conducted according to the requirements set out in the AIT and that, therefore, the complaint is valid.

Pursuant to subsection 30.15(4) of the CITT Act, the Tribunal awards IBM its reasonable costs incurred in preparing a response to the solicitation.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards IBM its reasonable costs incurred in relation to filing and proceeding with the complaint.

Charles A. Gracey

Charles A. Gracey

Member