CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, October 26, 1998

File Nos.: PR-98-012 and PR-98-014

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

AND IN THE MATTER OF decisions to conduct inquiries into the complaints 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 CITT Act), the Canadian International Trade Tribunal (the Tribunal) determines that the complaint in File No. PR-98-012 is valid because Solicitation No. 46577-7-1709/A was not conducted in accordance with Article 1008 (Tendering Procedures) of the *North American Free Trade Agreement* (NAFTA), Article VII (Tendering Procedures) of the *Agreement on Government Procurement* (the AGP) and Article 501 (Purpose) of the *Agreement on Internal Trade* (the AIT). The Tribunal also determines that the complaint in File No. PR-98-014 is valid because Solicitation No. 46577-7-1709/A was not conducted in accordance with Article 1013 (Tender Documentation) of NAFTA, Article XII (Tender Documentation) of the AGP and Article 506 (Procedures for Procurement) of the AIT.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department of Public Works and Government Services (the Department) issue a new solicitation for the procurement at issue. The new solicitation should be conducted in accordance with the provisions of NAFTA, the AGP and the AIT. More specifically, in the particular circumstances of this procurement, it is recommended that, in conducting the new procurement, the Department consider further reducing the impact of the conversion costs in evaluating proposals, in an attempt to provide for effective competition.

In the alternative, if the Department decides not to issue a new solicitation, the Tribunal recommends that the Department present to the Tribunal a proposal for compensation, developed jointly with Corel Corporation (Corel), that recognizes the lost opportunity that Corel experienced by being unable to make a responsive bid in this case and the possibility that it may have been awarded this solicitation. Furthermore, the proposal for compensation should address whether further compensation should be awarded in the context of paragraphs 30.15(3)(*a*), (*b*) and (*c*) of the CITT Act. This proposal is to be presented to the Tribunal within 30 days of receipt of the Tribunal's reasons.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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

Pierre Gosselin
Pierre Gosselin
Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be issued at a later date.

Date of Determination:	October 26, 1998
Tribunal Member:	Pierre Gosselin
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Hugh J. Cheetham Gilles B. Legault
Complainant:	Corel Corporation
Counsel for the Complainant:	Ronald D. Lunau
Intervener:	Microsoft Corporation
Counsel for the Intervener:	Michael K. Eisen Milos Barutciski Dany H. Assaf
Government Institution:	Department of Public Works and Government Services

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, November 6, 1998

File Nos.: PR-98-012 and PR-98-014

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

AND IN THE MATTER OF decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

INTRODUCTION

On June 12, 1998, Corel Corporation (Corel) filed a complaint (File No. PR-98-012) with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*1 (the CITT Act) concerning the procurement (Solicitation No. 46577-7-1709/A) by the Department of Public Works and Government Services (the Department) of an enterprise licence2 for an office automation (OA) suite.3 The OA suite to be selected had to be year 2000 compliant4 and would become the OA suite standard for the Department of National Revenue5 (Revenue Canada) for the following eight years. The requirement also included installation, product support, training, the conversion of documents, macros and applications, where necessary, and project management.

Corel alleged that the evaluation framework for the Request for Proposal (RFP) was biased in favour of the incumbent, Microsoft Corporation (Microsoft). Corel further submitted that the procurement was being carried out in a discriminatory manner to its detriment and to the detriment of the integrity of the Canadian procurement system. Specifically, Corel alleged that, contrary to Articles VII(1) and XII(2) of the *Agreement on Government Procurement*6 (the AGP), Articles 1008(1)(a) and 1013(1) of the *North*

---

1. R.S.C. 1985, c. 47 (4th Supp.).
2. The licensing of a large work group or site through an enterprise licence agreement. Enterprise licensing is common in the commercial off-the-shelf (COTS) software industry and usually results in a simplified licence agreement. See Government Institution Report, Appendix D.
3. A product grouping which consists of a family of COTS products capable of "data/information" manipulation by the suite in an integrated manner and fully supported by a single publisher. Data/information manipulation by the COTS suite describes the capability of producing, generating or otherwise processing, for example, tasks/documents/applications/data using information, word processing, spreadsheets, desktop databases and presentation graphics applications.
4. Refers to the ability of the hardware/software to accurately perform calculations, comparisons or sequencing that uses dates after January 1, 2000. See Government Institution Report, Appendix D.
5. The Department of National Revenue provides services to the public from approximately 250 sites in seven regions. It has approximately 40,000 employees utilizing some 30,000 desktop work stations and approximately 14,000 laptops. See Government Institution Report, para. 11.
6. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

*American Free Trade Agreement*7 (NAFTA) and Articles 501, 504(3)(b) and 504(3)(g) of the *Agreement on Internal Trade*8 (the AIT) (hereinafter collectively referred to as the trade agreements), the Department had: (1) combined the procurement of licences and integration/training requirements into one RFP when this was not done by Revenue Canada in its prior acquisition of some 25,000 Microsoft OA licences through standing offers;9 (2) imposed on some bidders requirements relating to training, integration and conversion (hereinafter collectively referred to as conversion costs)10 that were not imposed on Microsoft, even though these very substantial costs had not previously been charged to Microsoft, but rather absorbed by Revenue Canada; (3) imposed a bond requirement that appears applicable to Corel and not to Microsoft; and (4) imposed a selection and evaluation methodology which: (a) failed to meet the government's objective of creating equity of opportunity; (b) was not fair in its design or application; (c) violated the government's procurement policies and regulations; (d) was not in accordance with Canada's domestic and international trade agreements; and (e) appeared designed to ensure the ratification of Revenue Canada's 1996 decision to implement, on a non-competitive sole-source basis, the Microsoft OA suite as the departmental standard.

With respect to remedies, Corel requested that: (1) the statement of requirements and the selection and evaluation methodology in the RFP be amended to ensure that the RFP meets the needs of Revenue Canada, while complying with Canada's domestic and international procurement obligations; (2) the RFP be divided so that the provision of integration/training services become the subject of a separate RFP; (3) the RFP contain a clause to the effect that any Microsoft-based bid have, added to it, all Microsoft OA suite licence procurement costs associated with the RC7 project;11 (4) mandatory requirement REQ. 63.112 be removed from the RFP, as integration with SAP13 was already adequately covered in the RFP under two rated requirements; (5) the Tribunal issue an immediate order postponing the closing date of the RFP until 40 days after the validity of the complaint was determined; and (6) it be awarded the costs of preparing its complaint.

---

7. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
8. As signed at Ottawa, Ontario, on July 18, 1994.
9. An offer from a potential offeror which allows the Crown to purchase frequently ordered commercially and non-commercially available goods and/or services directly from suppliers at prearranged prices, under set terms and conditions, when and if such goods and services are requested.
10. In these reasons, the term "conversion costs" includes the direct and indirect costs of changing from the currently deployed COTS office suite to an alternative software product that may offer similar functionality, but that will have, for instance, different file formats, scripting languages and underlying macros. Conversion costs also include training costs and other costs incurred in changing to the new software.
11. Revenue Canada's designation for its distributed computing environment project. The goal of the project is to provide a year 2000 compliant computing environment throughout Revenue Canada. The computing environment is made up of several pieces, namely, NT 4.0 Network Operating System, Windows 95 and NT 4.0 Client Operating Systems, Exchange Server for messaging (e-mail) and an OA suite. See Government Institution Report, para. 20.
12. In amendment No. 1 to the Request for Proposal, the proposed OA suite is required to support and integrate, without restriction, with a SAP XXL List Viewer.
13. SAP is a developer of financial management systems COTS software for large corporate entities. See Government Institution Report, Appendix D.

On June 17, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*14 (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 June 18, 1998, the Tribunal issued an order postponing the award of any contract in relation to the procurement at issue until it determined the validity of the complaint. On June 29, 1998, the Department certified that the procurement to which the designated contract related was urgent and that a delay in the award of the contract would be contrary to the public interest. Pursuant to subsection 30.13(4) of the CITT Act, the Tribunal rescinded its postponement of award order on July 2, 1998. On July 10, 1998, the Tribunal informed Microsoft that it had been granted leave to intervene in File No. PR-98-012.

On July 14, 1998, Corel filed a second complaint (File No. PR-98-014) in respect of the solicitation at issue. Corel alleged that, contrary to the trade agreements, the Department had, since June 12, 1998, the date of Corel's first complaint, persisted in its refusal to provide sufficient and appropriate information to allow Corel to prepare a responsible bid and had unreasonably refused to extend the bid closing date in order to allow sufficient time for the government to provide the required information and for Corel to prepare a bid. In addition to reiterating its request contained in the first complaint that the solicitation be reopened and the RFP revised, Corel requested that, in the alternative, the Tribunal award it compensation, which recognizes that Corel has been denied the opportunity to compete for this procurement and to profit from it, and costs.

On July 17, 1998, the Tribunal informed the parties that the second complaint had been accepted for inquiry and that it intended to proceed with this complaint in conjunction with Corel's first complaint. The Tribunal requested that the Government Institution Report (GIR) to be submitted address both complaints. On July 21, 1998, the Tribunal informed Microsoft that it had been granted leave to intervene in File No. PR-98-014. On August 11, 1998, the Department filed the GIR, relating to both complaints, with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*15 (the Rules). On August 26, 1998, Corel and Microsoft filed comments on the GIR with the Tribunal. On September 8, 1998, the Tribunal granted the Department permission to respond to the new issues raised in Corel's comments on the GIR. As well, the Tribunal asked the Department to provide additional information in respect of the additional Microsoft licences/upgrades procured by Revenue Canada after August 28, 1997, and the value of the retroactive contract relating to these purchases. In filing further submissions on September 11, 1998, the Department responded to the Tribunal's request. On September 21, 1998, Corel sent comments in reply. Microsoft informed the Tribunal that it supported the Department's response to Corel's comments on the GIR.

Given that there was sufficient information on the record to determine the validity of the complaints, the Tribunal decided that a hearing was not required and disposed of the complaints on the basis of the information on the record. The Tribunal issued its determination on October 26, 1998.

14. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
15. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

BACKGROUND AND PROCUREMENT PROCESS

The RFP for this requirement was released on May 15, 1998, to Canada's Electronic Tendering Service (MERX). In order to better understand the background to these complaints, the Tribunal will outline how Revenue Canada arrived at its current office information processing base.16

During the 1991-92 period, Revenue Canada, Customs and Excise (RCCE) decided to move from a DOS-based microcomputer software application to Windows-based applications and to adopt a departmental standard. RCCE conducted an internal technical evaluation of all Windows-based software applications for word processing, spreadsheets, presentations and databases and selected Microsoft as its departmental OA standard. In March 1992, RCCE requested the Department to purchase 4,367 Microsoft OA licences, and the Department issued an Advance Contract Award Notice17 to this effect. The major competitors of Microsoft at that time, Lotus Development Corporation (Lotus) and WordPerfect Corporation (WordPerfect), were aware of RCCE's evaluation. Lotus submitted an unsolicited proposal for the requirement which included a combination of Lotus and WordPerfect products. This offer was rejected for technical reasons. A contract for 4,744 OA licences was eventually awarded to Microsoft. Later in 1992, an additional contract was awarded for 1,400 Microsoft OA licences. At that point, RCCE had approximately 7,144 such licences to cover its 11,00018 microcomputer base.

Also in 1992, Revenue Canada, Taxation (RCT) conducted an internal technical evaluation of the Windows-based OA products available at the time, which resulted in the selection of two Lotus products (Ami Pro and Freelance) and two Microsoft products (Excel and MS-Mail).

In September 1992, RCCE and RCT were consolidated into a single operation. In November 1992, a decision was made to have Microsoft Office made the departmental standard. During the 1993-94 period, Revenue Canada acquired an additional 10,106 Microsoft OA licences using the National Master Standing Offer19 (NMSO) method of supply. In February 1995, the Department awarded an NMSO to Microsoft that included provisions for large account volume site licence (Select Agreement) procurements. The Select Agreement provided for lower prices on high-volume purchases and a less onerous framework for the acquisition of licences. In the 1995-96 period, Revenue Canada used this method of purchasing to increase the number of Microsoft OA licences to 22,436, which represented approximately 80 percent of its base. These OA licences were used to create hundreds of thousands of work instruments (e.g. documents, spreadsheets, presentations and databases). Many of these work instruments continue to be used today.

In September 1996, Revenue Canada management approved the RC7 project, which was aimed at establishing a standard year 2000 compliant desktop and server infrastructure at all departmental sites across

---

16. This base includes, in addition to Microsoft software, some 4,000 WordPerfect users. See Request for Proposal, section 2.2.3.

17. A notice of intent to solicit a bid and negotiate with only one firm. It is not a competitive solicitation notice. Suppliers, however, on or before the date indicated in the notice, may identify their interest and demonstrate their ability to perform the contract.

18. This number includes 1,000 Microsoft OA licences procured prior to 1992.

19. A National Master Standing Offer is a particular type of standing offer open to a number of authorized government departments and agencies, on a national basis, to achieve repetitive buys of goods and/or services at pre-negotiated terms and conditions. A contract is effected when an authorized user completes a specific call-up (an order) against the standing offer.

Canada. This project involved the upgrade and/or replacement of essentially all of the hardware and software acquired by Revenue Canada during the last decade. The procurement strategy for the RC7 project was based on the use of established procurement methods. In the case of OA software, Revenue Canada planned to rely on call-ups against the Microsoft NMSO. In March 1997, Revenue Canada started to replace year 2000 non-compliant software with software upgrades under the Select Agreement of the Microsoft NMSO.

On August 28, 1997, the Department and the Treasury Board of Canada Secretariat (TBS) advised departments of changes that they were introducing with respect to the NMSO for COTS software and computer application software. These reflected changing conditions and the desire of the TBS and the Department to return to the original intent of standing offers as a method of supply, i.e. to meet local needs for small quantities.20 Accordingly, the new directive limited the authority given to departments to purchase software directly from suppliers to 10 licences or 1 licence covering 10 people to a maximum of $40,000 per call-up.

While the Department and the TBS had restricted the delegated authority for call-ups against standing offers to procure software in existence as of August 28, 1997, Revenue Canada continued the rollout of the RC7 project as planned. According to the Department, this was done because of the effect that any delay would have on Revenue Canada's ability to achieve year 2000 compliance, including the possibility that implementation teams, which had been organized and trained over a period exceeding six months, would move to other projects both inside and outside Revenue Canada. Between September 1997 and May 22, 1998, the date on which the RFP was posted on MERX, Revenue Canada installed and subsequently retroactively purchased 16,468 Microsoft OA suite upgrades using the Microsoft NMSO.

Against this background, in April 1998, it was decided to open up Revenue Canada's OA suite requirement to competition, notwithstanding the urgency of achieving year 2000 compliance. The need to take into consideration investments already made by Revenue Canada, in terms of training personnel, the development of forms and software applications, etc., was an important requirement of the process. Given the urgency associated with the requirement and the desire to give bidders the opportunity to compete and the maximum time to perform the work, a first draft of the RFP was issued to potential bidders on April 23, 1998.

On April 24, 1998, Revenue Canada, the Department and Corel, Lotus and Microsoft (the three publishers of OA suites) met to review the draft RFP. On April 28, 1998, Corel provided its initial response to the document. In summary, Corel indicated that it believed that it was unreasonable to call for SAP compatibility as a point-rated requirement of the RFP and expressed concerns about the use of conversion costs as an evaluation criterion. On April 30, 1998, the Department faxed an updated version of Appendix A to the draft RFP, entitled "Statement of Requirements," to the three publishers, asking for their comments. On May 1, 1998, Corel responded and reiterated its concerns about conversion costs, including training costs. During the period from May 4 to 15, 1998, the Department finalized the RFP. Concerns raised about conversion requirements led to the hiring of Science Applications International Corporation (SAIC) to carry out a detailed study concerning the scope of the file conversion effort (the SAIC report). On May 22, 1998, the RFP was posted on MERX. The Department recognized that not all the information

20. Government Institution Report, Exhibit G.

required to respond to the RFP was available at the time of its issuance.21 The intention was to release additional information as it became available. The RFP was subsequently amended five times.

The RFP included the following provisions:

(1) the note on page 5 of the RFP advised that a bidders' conference was to be held on or about June 3, 1998, and that site visits were to be held on or about June 9, 10 and 11, 1998. The site visits were intended to allow bidders to visit/review Revenue Canada's certification premises and procedures and to experience the certification process by conducting a sample installation and set of tasks leading to certification;

(2) the "Statement of Requirements," Appendix A to the RFP, indicated under mandatory REQ. 7 that the proposed OA suite must be commercially available22 as an integrated set of components on the date of bid closing. REQ. 73, a point-rated requirement, indicated that the proposed OA suite should be certified by SAP as being compatible with its software;

(3) item 1 of section 2.1.1 of Appendix B to the RFP, "Selection & Evaluation Methodology," stated that, for bid evaluation purposes, the value of the RC7 Microsoft OA suite upgrades/licences deployed from August 1997 until the date on which the RFP was issued would be added to any bid that included Microsoft OA software; and

(4) item 3 of section 2.1.1 of Appendix B to the RFP requested bidders to bid a firm lot price for the conversion of current OA suite template files and applications containing scripts, macros, forms and interfaces to a replacement suite, and item 4 of section 2.1.1 requested bidders to provide a firm lot price for the migration and conversion of existing Lines of Business and OA functions to a replacement suite.

On May 26, 1998, Corel submitted its first list of questions. Included in the matters raised by Corel was the delay incurred in obtaining configuration documentation. Corel indicated that, as a result of this delay, it might require an extension of the RFP closing date to accommodate this delay. Corel also advised that it would be impossible to provide a firm lot price for conversion unless additional details were provided.

On May 29, 1998, the Department released amendment No. 1 to the RFP. The amendment provided Corel with information relating to Revenue Canada's approval process for the distributed computing environment platform and for preparing applications for the RC7 environment, including information on Line of Business applications residing on Revenue Canada's distributed computing environment platforms. The amendment also provided a compact disc containing configuration documentation. All this information was relevant to the planned site visits. The amendment included a revised approach to the requirement of OA suite interoperability with the SAP-based corporate administrative system. According to the Department, given that OA suites were not any of the software products certified by SAP, the point-rated requirement for SAP certification was deleted and a new mandatory requirement (REQ. 63.1) was added. The amendment indicated that the requirement was made mandatory because of the significant impact that this function would have on 9,000 Revenue Canada employees.

---

21. Government Institution Report, para. 50.

22. Defined in the Request for Proposal as "Non beta version/copy(ies) of the software available in the market place as demonstrated through public press releases, price listed in 'Price List' catalogs and installed at a Corporate site other than that of the Publisher or the Bidder."

On June 1, 1998, Corel submitted a second list of questions concerning, in part, the rationale for contract financial security, performance penalties and the new SAP requirement. On June 2, 1998, the Department advised bidders, by facsimile, that the bidders' conference scheduled for June 3, 1998, was cancelled due to the fact that the final information pertaining to how to deal with the conversion effort was not available. Information concerning conversion requirements expected to be released at the bidders' conference was made available to all bidders in amendment Nos. 1 (May 29, 1998), 2 (June 3, 1998) and 3 (June 18, 1998).

On June 2, 1998, the Department requested Corel to reformulate its concerns regarding conversion costs in the form of questions that could be answered in a manner applicable to all bidders.

On June 3, 1998, Corel submitted a third list of questions concerning the inclusion of training, distribution, migration and file conversion costs in the RFP. It also requested that the costs of licences, training, distribution, migration and file conversion incurred by Revenue Canada prior to August 1997 be added to any bid based on the Microsoft OA suite. That same day, the Department issued amendment No. 2 to the RFP, which included information on training services. Prospective bidders were also informed that additional details on the conversion requirements would be provided at the earliest possible date.

On June 4, 1998, Corel submitted a fourth list of questions. It asked for details of the proposed visit to Revenue Canada, as well as additional information about the RC7 project. On June 8, 1998, the Department wrote to Corel regarding its site visit, then scheduled for June 12, 1998. On June 9, 1998, Corel wrote to the Department requesting additional information on the site visit. Corel noted that, as its technical resources were in Orem, Utah, it would be difficult to determine who should be present for the visit until the additional information was provided. On June 10, 1998, the Department provided additional information on the site visit. That same day, Corel advised the Department that it would not be able to schedule the appropriate staff to be present for the site visit.

On June 12, 1998, Corel filed a complaint (File No. PR- 98-012) with the Tribunal.

As noted, on June 18, 1998, the Department issued amendment No. 3 to the RFP. The amendment included a copy of the RC7 platform rollout strategy, the SAIC report which was received by Revenue Canada on June 3, 1998, and Revenue Canada's analysis of the report dated June 5, 1998. The amendment indicated that the number of files considered to be operationally critical had been reduced and the number of business applications requiring conversion specified. The amendment also conveyed to bidders two important decisions:

> (1) with respect to training costs and file conversion costs, that the government had decided that these costs would be evaluated at 50 percent of the price proposed; and
>
> (2) that the requirement for a firm lot price for file conversion costs had been changed to a firm unit price per type of files to be converted and that the number of files of each type to be converted had been reduced to those that were considered essential.23 Concerning Corel's question as to the effort required to achieve the conversion, the amendment indicated that only contractors could estimate the level of effort, as it was dependent on the skill level of the people and the tools available to contractors.

---

23. Almost 12 percent of the total, or approximately 94,500 documents. In order of volume, these documents are made up of spreadsheets, word processing, presentation graphics, embedded OA applications and databases. See Revenue Canada's covering memorandum to the SAIC report.

On June 24, 1998, Corel submitted another list of questions relating to Revenue Canada's analysis of the SAIC report. Corel noted that the SAIC report provided no information to allow bidders to estimate the actual person-days of effort required to achieve the conversion requirements. It requested that the government consider alternative methods of handling conversion requirements, such as the use of existing year 2000 standing offers, the issuance of a separate RFP for conversion services or the amendment of the current RFP to seek hourly or per diem rates for conversion work. Corel also asked for clarification on the estimate of 705 days of conversion work mentioned in Revenue Canada's covering memorandum to the SAIC report.

On June 29, 1998, Corel wrote to the Department requesting an extension of the July 6, 1998, bid closing date on the basis that it had not received all the information necessary to formulate a responsive bid.

On June 30, 1998, the Department issued amendment No. 5 to the RFP. This amendment included, among other things, answers to Corel's remaining questions and advised that, due to the urgency of the requirement, the Crown could not extend the solicitation period. In response to Corel's questions, the Department indicated that: (1) sample files had been collected by the SAIC project team and brought to the meetings held with publishers and interested integrators during the week of June 10 to 12, 1998; (2) these files could be reviewed by interested bidders on July 2, 1998; (3) it would not consider alternative methods for handling conversion requirements, as the methods proposed by Corel either transferred all risk relating to conversion from the bidder to the government or unfairly penalized a bidder with a creative solution to the conversion problem; (4) Revenue Canada could not estimate the level of effort required to perform the conversion, since it was unaware of the skill level of a bidder's resources and the quality of its tools; (5) the estimate of 705 days of conversion work mentioned in Revenue Canada's covering memorandum to the SAIC report was referring to the 16 Line of Business applications identified in Appendix C to the SAIC report; (6) the training requirements, as stated in the RFP, reflected Revenue Canada's requirements and provided bidders with flexibility and innovation in delivery; and (7) each requirement that it handled was assessed on a case-by-case basis for risk associated with its delivery and that, in this instance, because of the critical consequences of the failure to deliver on the Crown's interests, it was decided to require a $2 million performance bond to be posted.

On July 2, 1998, Corel met with Revenue Canada to review the sample files. On July 3, 1998, Corel wrote to the Department complaining about the lack of meaningful information provided to calculate the conversion costs. According to the Department, it received Corel's letter on or about July 8, 1998, that is, after bid closing on July 6, 1998.

On July 7, 1998, according to Corel, it learned that Revenue Canada had retained the services of a consultant, Hill and Knowlton, to assist it in preparing the GIR. At the time, Hill and Knowlton was registered as a lobbyist for Microsoft.

On July 14, 1998, Corel filed a second complaint (File No. PR-98-014) relating to this solicitation.

VALIDITY OF THE COMPLAINT

Corel's Position

Corel began its submissions relating to the first complaint by arguing that government procurement policies and practices were built upon the principles of fairness, openness and transparency and the obligation to provide equal opportunities to all firms and individuals competing for government work. These

principles are set out in domestic regulations and policies, as well as in the trade agreements. Corel submitted that the procurement process at issue clearly failed to measure up to these standards. More specifically, Corel's submissions addressed two main concerns: the structure of the RFP and Corel's unsuccessful attempt to get information. Corel submitted that the statement of requirements and evaluation framework of the RFP discriminate with respect to conversion costs and that they clearly establish a bias against potential suppliers not offering Microsoft-based products.

With respect to the "levelling" mechanism chosen by the Department, Corel submitted that there was no justification to limit its application to the seven-month period following August 28, 1997. Rather, it should be applied from the start of the RC7 project, so as to include all the licences bought under that project. Fairness, Corel added, would demand that any Microsoft-based bid also include all Microsoft OA licence procurement costs associated with that project, including all conversion costs. As to combining the procurement of licences with the procurement of integration and training services, Corel submitted that an unfair playing field resulted from that decision, given that the previous procurements made by Revenue Canada were limited to the purchase of software licences, while bidders, other than Microsoft and those offering Microsoft-based products, were now being asked to bid on a bundle of products and costly services not required of the incumbent. This would make Corel's and similar bids non-competitive. This is so, in part, because, while non-Microsoft bidders have to provide a firm lot price for the conversion of current office suite template files, macros, scripts, forms, etc., they are not provided with the information, such as numbers, description and complexity, that would enable them to bid responsively in respect of these undoubtedly substantial costs. Other examples of discrimination, Corel submitted, were the addition of the $2 million bond requirement and the changing of a SAP-certification rated requirement to a SAP-interface mandatory requirement, which the Department knew would make Corel technically non-compliant.

In its response to the GIR and in subsequent submissions, Corel drew the Tribunal's attention to what it characterized as admissions from the Department, including: (1) that the incumbency of Microsoft at Revenue Canada poses an obstacle to fair competition by imposing an unequal burden on potential suppliers; (2) that the RFP was issued without information necessary to bid being available or being reliable; (3) that the RFP created a greater risk to non-Microsoft bidders; (4) that the Department failed to provide all bidders with the same information, in that only Microsoft knew the details of the Microsoft-installed base at Revenue Canada; (5) that the purchase of Microsoft licences/upgrades by Revenue Canada after August 28, 1997, was a violation of government policy; and (6) that, although Revenue Canada understood after August 1997 that it was acting contrary to the procurement rules, this solicitation was, nevertheless, delayed by another six months, resulting directly in self-generated urgency.

Corel submitted that the GATT *Agreement on Government Procurement*[24] (the Code) clearly applied to the initial decisions of RCCE and RCT to buy Microsoft OA licences and the subsequent decision of Revenue Canada to make Microsoft its standard. Corel also submitted that the presumptive rule under the Code was that the acquisition of goods was to be carried out by means of open tendering. In certain very limited circumstances, selective tendering was permitted and, in more limited circumstances, sole sourcing or "single tendering" was permitted, but none applied in this instance. Consequently, the Department cannot now claim that the subsequent sole sourcing requirements using the Microsoft NMSO were justified under Article V: 15 (*d*) of the Code or, subsequently, under Article 1016(2)(d) of NAFTA. Corel further submitted that the manner in which Microsoft came to be established as the *de facto* standard within Revenue Canada was not consistent with government policies and that the history of this case demonstrates that Revenue

24. Geneva, March 1980, GATT BISD, 26th Supp. at 33 (in force for Canada on January 1, 1981).

Canada simply set out with single-minded determination to entrench Microsoft as its standard, without resorting, at any stage, to a fair and open competition at which all options could be presented and objectively assessed. Corel added that, regardless of when the procurement began, Revenue Canada was making purchases on an ongoing basis after 1994 using a procurement methodology that clearly gave rise to the application of Article 1002 (Valuation of Contracts) of NAFTA. It is apparent from the call-ups by Revenue Canada against the Microsoft NMSO that, after 1994, any rolling 12-month period requirements would have exceeded the NAFTA monetary threshold. Corel submitted that the strategy that was actually followed by Revenue Canada flouted both the letter and the spirit of NAFTA.

With respect to conversion costs, Corel submitted that, since at least 1994, the Department has had a policy of adopting total life cycle costing for procurements in which operating costs are a major part of the total cost of the product. Therefore, the government already has a policy framework in place to deal with such costs. Furthermore, Corel submitted that, where the installed base is of questionable origin, the application of the conversion costs should be rigorously monitored for fairness. The concern is that such costs should not be used to discriminate against non-incumbent bidders, so as to either discourage them from bidding or handicap their bids so that they cannot compete on a level playing field. Corel added that, considering the very significant conversion costs associated with this procurement and the presence of a significant performance bond, the Department, by virtue of its own internal policies, was required to provide much clearer descriptions and information with respect to the conversion work required. In Corel's view, the information provided was clearly deficient, and it was unreasonable to expect bidders to assume significant performance risks on this basis. Further, given that such costs and risks would not fall onto bidders offering Microsoft products, such a condition clearly discriminates against non-Microsoft bidders. Corel also submitted that, if the government's actions create barriers to fulfilling its commitment of equal access, then the cost of mitigating or eliminating those barriers must fall on the government which created the barriers.

Regarding amendment No. 3 to the RFP, by which the Department adopted a method of pricing conversion work based on a "firm unit price" as opposed to a "firm lot price," Corel submitted that this change was made only on June 18, 1998, that is, after it had submitted its first complaint. This, coupled with the fact that the sample files that it was shown by Revenue Canada on July 2, 1998, were of no practical value, constituted, in Corel's view, a clear failure to provide bidders with the necessary information to bid responsibly. In this regard, Corel observed that, given the ongoing presence in the RFP of a $2 million performance bond, the risk to suppliers had not been reduced significantly.

Corel argued that the explanation given in the GIR to change the SAP point-rated requirement in the RFP to a mandatory requirement was not credible, as Corel had never asked or suggested that the Department make such a change. Corel submitted that the explanation offered in the GIR for this change, i.e. in order to make it easier for OA suite developers to bid, was implausible. Corel further submitted that, even if it were assumed that the SAP compatibility issue was of low technical complexity, Corel still would not have been able to satisfy all the elements in the definition of "commercially available" in the time allowed.

Corel submitted that, throughout the GIR, the government argues that the urgency of the situation, because of year 2000 implications, has forced it to include, in the RFP, certain unusual requirements and to impose an aggressive implementation schedule. Corel submitted that it was implausible for the government to now attempt to rely on "urgency" in light of the background to this case. For instance, evidence indicates that Revenue Canada has been touting its readiness for year 2000 compliance for some time and has been working on year 2000 issues since 1988. Furthermore, the GIR clearly acknowledges that Revenue Canada

recognized, as early as 1996, that it required a standard, enterprise-wide year 2000 compliant distributed computing platform that included Microsoft Office as the office suite.

Turning to Corel's second complaint, Corel argued that, despite several attempts on its part to obtain clarification on conversion costs from the government since the publication of the draft RFP, it was never in a position to calculate a firm, fixed price for these costs. For instance, Corel said that it had many contacts with government officials regarding the preparation of the site visits. However, it was not until June 30, 1998, that it was informed that the Department intended to provide information on conversion costs at these visits, including such critical information as the number of sample files collected by the SAIC project team during the preparation of its report. Corel argued, in regard of this latter information, that not only was it told at the last minute that it existed but also was not given a meaningful opportunity to analyze and consider it.

Similarly, Corel submitted, the Department encouraged bidders to rely on the SAIC report, but the report was only delivered to bidders several weeks after the RFP was issued. Furthermore, the report proved to be insufficient for the purposes of responsible bid preparation. The report itself cautioned third parties against using the report for the purposes for which it was intended, and the Department was now attempting to dismiss these views as "irrelevant."

This lack of sufficient information on the conversion work, Corel argued, continued when it met with Revenue Canada on July 2, 1998, to review the samples. No information was provided to enable Corel to determine how representative these samples were of all the files that would need to be converted. Moreover, it became clear to Corel, while reviewing the results of the meeting, that the sample files that it was given did not provide an accurate indication of the type of work that may need to be accomplished.

Regarding the government's refusal to extend the bid closing date, Corel argued that it was unreasonable for the government not to allow sufficient time for providing the required information that would have permitted Corel to file a responsive bid. As a result of the government's failure to provide such information prior to the bid closing date and its subsequent refusal to extend the bid closing date, Corel submitted that it had no alternative but to inform the Department that it was unable to respond to the solicitation.

In its reply to the GIR and further submissions, Corel submitted that the onus should not be placed on bidders to feel their way through a maze of unreliable, misleading and inaccurate information and to ferret out problems, all within an impossibly tight time frame. The onus is on the government to provide the best information available. This, Corel submitted, was particularly the case where knowledge as to the types, quantities and complexities of files requiring conversion was solely and uniquely in the possession of the government and not Corel. If, as suggested by the Department, the above information was truly the best that the government could provide, it clearly indicated that Revenue Canada itself never developed a proper understanding of the scope of the work that was required to satisfy the conversion requirements.

Corel submitted that the changes to the pricing scheme for conversion work made in amendment No. 3 to the RFP did not render the cautionary views of the authors of the SAIC report irrelevant. Although the amendment reduced the volume of work to be done, it still did not provide information on which bidders could judge the conversion effort. They only had the SAIC report, and it clearly stated that its data were "subject to at least four compounding sources of error25" and cautioned that "[c]are should be taken when using these numbers to calculate such things as man-hours of effort as any results may have an error which

25. SAIC report, June 3, 1998, para. 4.3.5.

could be significant.26" In addition, Corel submitted that the Department's argument that the reduction in the volume of conversion work to be done shifted the risk of non-performance from the vendor to the Crown was without merit, given the irrevocable $2 million bond to be posted by bidders, the extremely tight time frames for performance and the unreliability of the information provided to bidders to assess the conversion effort.

Corel observed that the government's response to the Tribunal's questions did not provide the Tribunal with any product numbers, prices or descriptions of the products which conform to the descriptions appearing in the Microsoft NMSO. Consequently, it is impossible to determine exactly what product(s) have been purchased under the NMSO.

Corel raised the point that the government had retained the services of a company (Hill and Knowlton) that was registered to lobby for Microsoft on government procurement issues. Corel submitted that this situation created a perception of unfairness, raising the issue of whether the procurement process, in this instance, was biased in favour of Microsoft.

Finally, in response to the Department's suggestion that its second complaint was not a new complaint or a complaint at all, Corel submitted that, since the second complaint raises issues that relate to actions and information which came to light after the date on which it filed its first complaint, it was not possible for Corel to raise these matters in its first complaint. Corel submitted that the Department's allegation that the second complaint was made merely to raise a claim for compensation that Corel had been too "presumptuous" to include in its first complaint was absurd. Corel's objective in its first complaint was to establish fair rules by which it could compete for the procurement at issue on a level playing field. However, because the Department caused the Tribunal's postponement of award order to be rescinded, Corel's second complaint had to address the possibility that it may no longer be possible for the Tribunal to recommend, as a remedy, a process which would permit fair competition. Accordingly, Corel had no alternative but to request compensation as alternative relief in the event that the contract award was a *fait accompli*.

Department's Position

The Department's submissions with respect to the allegations of discrimination were both general and specific. With respect to the question of incumbency generally, the Department submitted that, while the government does its utmost to ensure that every competitor has a "fair" opportunity to compete, it recognizes that, at times, certain bidders may have a cost advantage, due to a bidder being the incumbent or existing contractor. Non-incumbent suppliers may have to incur conversion costs that the incumbent does not have to incur and, according to the Department, bidders in these circumstances must make a business decision whether to compete or not. The government, the Department submitted, cannot ignore these costs, for to do so would penalize the taxpayer. The Department also submitted that to suggest that, where there is an incumbent, the government must always ensure that the "playing filed" is perfectly level would completely undermine the Crown's ability to acquire goods and services at the best value to Canadian taxpayers. If the Tribunal accepted Corel's position, the result would be that potential bidders would compete only on the price of the software licence, leaving the taxpayer to substantially abandon its investment in previous versions of the software and to bear over and over again the cost of installing new software, of training employees and of converting necessary documents.

26. *Ibid.*

The Department submitted that the letter of August 28, 1997, and the RFP itself represent a commitment to obtain best value in the area of office software by reassessing the market at reasonable intervals. The reasonable interval for office software, the Department further submitted, has come about recently with the increasing convergence of the competing products in functionality and ease of use. Such convergence did not exist when Revenue Canada made its original decision on standardization of its office software. Further, it would be unreasonable to require competition every time the government procures additional licences or additional copies of an incumbent's software. Installation, training and file conversion costs are very substantial, and they are dwarfed by the loss of productivity and other opportunity costs involved in a fundamental change. The drafters of the various trade agreements, the Department submitted, cannot have intended to impose such an obligation.

The Department submitted that, in the RFP, the first of its kind since the Tribunal's decision in File No. PR-96-037,27 the government recognized the obstacle to effective competition represented by an incumbent's product. In this instance, the government has decided to absorb some of the risk faced by suppliers of alternative software in a number of ways, for example, by limiting the number of records to be converted and by reducing the importance of the training and conversion cost components in the evaluation of bids. The government's commitment is also reflected in the fact that it has competed this requirement notwithstanding the necessity of completing a successful transition to year 2000 compliant software.

In responding to Corel's first complaint, the Department's submissions began by addressing the allegation that the requirements of the RFP were biased against suppliers other than Microsoft. With respect to Corel's suggestion that the Tribunal consider whether the installed base of products at Revenue Canada was "legitimately established" or "improperly established," the Department noted that these acquisitions occurred between 1992 and 1997. The Department submitted that the Tribunal does not have jurisdiction to deal with any procurement that predated January 1, 1994, because this was when the Tribunal acquired its authority over trade complaints. With respect to procurements initiated after January 1, 1994, the limitation period in section 6 (Time Limits for Filing a Complaint) of the Regulations has long since expired. In addition, the Department submitted that the Tribunal was not empowered to determine whether a procurement complies with internal government procurement rules or with the government's procurement policies, except insofar as those rules or policies contravene the trade agreements. The Tribunal also does not have jurisdiction to grant remedies with regard to procurements for which its has no jurisdiction.

Regarding the procurement of 4,744 Microsoft OA licences in 1992, the Department submitted that Directive No. 0023, dated August 14, 1991, of the Office Automation, Services and Information Systems, of the Department of Supply and Services, clearly indicates that the acquisition of a licence to use software, as was the case for the above-mentioned Microsoft OA applications, constituted the acquisition of a "service" as opposed to the acquisition of a "good." Since, according to the Department's interpretation, service acquisitions *per se* were not covered by the Code at the time, this acquisition cannot have been in breach of the Code on this point. Concerning Corel's allegation that the government breached Article 1002 of NAFTA in using NMSOs as it did, the Department submitted that this article cannot be read as having the effect of mandating competitive procedures for a procurement where grounds properly exist for limited tendering. The Department also submitted that, irrespective of how one characterizes the driving forces behind the August 28, 1997, letter, it nevertheless remains that there was no operative rule or policy binding on Revenue Canada prior to that letter that invalidated Revenue Canada's use of the NMSOs in the manner described in the GIR.

---

27. *Sybase Canada Ltd.*, July 30, 1997.

The Department submitted that, regarding the inclusion of conversion costs, it was not clear whether Corel takes the position that the inclusion of the requirements for integration, data conversion and training constitutes *per se* a breach of government procurement procedures and of the trade agreements or whether the breach results only from the alleged impropriety of the manner in which the installed base of OA software at Revenue Canada was acquired.

With respect to the first interpretation, the Department observed that, as software is used over a period of time, documents, templates and macros are developed to be used in conjunction with that software and that applications may be developed that are based on that software. In the case of Revenue Canada, one must keep in mind that the RFP is for hundreds of thousands of items.28 If the government was compelled to compete its conversion requirements separately, such costs would be incurred by the taxpayer for a second time. If the provisions of the trade agreements were meant to require this, then such a requirement should be expressly stated or such an interpretation should be inescapable. As no such express requirement exists, the Department submitted that interpreting the trade agreements in this manner would tilt the competition in favour of suppliers other than the incumbent and would create a significant disincentive to conducting a competitive procurement.

The Department submitted that the fact that an uneven burden existed for different potential bidders was not the result of an arbitrary decision by the government, but rather is due to the history of the use of software at Revenue Canada. Moreover, the Department submitted that the Tribunal, in *Sybase*, sanctioned the approach taken by the government in the RFP in respect of transition costs.

Concerning the second interpretation, the Department argued that the initial selection in 1992 of the Microsoft OA software by RCCE was carried out in conformity with all rules applicable at the time. RCCE's decision was based on the functional and usability advantages offered by the Microsoft OA software which provided sole-source justification under the *Government Contracts Regulations*,29 the only applicable rules at the time. Given that Revenue Canada has never conducted a reassessment of its 1992 decision to standardize on the Microsoft OA software and that such a reassessment was not warranted until this procurement, purchasing licences under the Microsoft NMSO did not violate any rules imposed on the use of NMSOs. The Department further submitted that "contract splitting" presupposes that a competitive process would be otherwise required. As submitted above, this was not the case.

The Department addressed Corel's suggestion that item 1 of section 2.1.1 of Appendix B to the RFP be amended to reflect the cost of all upgrades and related conversion costs since the inception date of the RC7 project in 1996 by adding to the price of any Microsoft-based bid the value of all upgrades to the Microsoft Office suite obtained by Revenue Canada under the RC7 project after August 28, 1997. The Department submitted that there was no basis for such an amendment to the RFP. Not only was there no contract splitting but, further, the deployment of software under the RC7 project did not constitute the acquisition of additional copies of the Microsoft OA suite. Rather, it was an upgrade of existing installed copies to versions capable of processing date-related data after the year 2000. The Department submitted that an upgrade to existing installations in order to repair a deficiency in the version of a particular software was not a change in requirements that would invalidate a previous, properly made decision to standardize such software.

28. Amendment No. 3 to the Request for Proposal in the SAIC report.
29. SOR/87-402, June 30, 1987, *Canada Gazette* Part II, Vol. 121, No. 15 at 2759, as amended.

The Department recognized that the continued deployment of Microsoft OA suite upgrades by Revenue Canada after the August 28, 1997, letter was a breach of policy. The Department did, however, acknowledge that that deployment led to a need to adjust the "level playing field" and that this was done through item 1 of section 2.1.1 of Appendix B to the RFP.

Turning to the mandatory requirement for interface with the SAP software, the Department submitted that this requirement does not discriminate against Corel. It represents a standard requirement for Windows-based software, a requirement which, in Corel's own admission, is a technological issue of relatively minor proportion. Furthermore, the Department submitted that the requirement was drafted in a manner which allows compliance with the requirement to be achieved individually by the publishers of the OA suites, as opposed to being determined by SAP.

Concerning the lack of information to price the data conversion requirements in the RFP, the Department submitted that, in recognition of this difficulty, the requirement was amended to require that bidders propose a firm price per file for the various types of files to be converted. The number of files for each type of file to be converted was also reduced, and only 50 percent of the price component for such conversion would be counted in assessing the bids.

Concerning the requirement that suppliers post a $2 million bond as financial security for the contract, the Department noted that it has not been customary to require such security in contracts for the installation of software and related training and data conversion. However, given the extreme importance of this requirement because of the year 2000 concerns, the Department submitted that the requirement was prudent and justified in the circumstances. In addition, considering that the risk to bidders for non-performance had been reduced considerably, the requirement was reasonable.

Turning to Corel's second complaint, the Department submitted that this complaint was not truly a separate complaint, but rather an attempt to circumvent the CITT Act, the Regulations and the Rules by adding a request for relief in damages for loss of profit, which was not claimed in the first complaint. The complaint raises no new grounds of complaint, but rather adds new facts to grounds already introduced in the first complaint. The Department also submitted that the Tribunal was without jurisdiction to consider any of the relief requested in the second complaint, because the granting of Corel's request to reopen and amend the solicitation at issue or to terminate any contract award pursuant to it would result in the Tribunal accomplishing, in another form, results that are not permitted by subsection 30.13(4) of the CITT Act as a result of the Tribunal rescinding its postponement of award order. As well, the granting of compensation to Corel would amount to circumventing the filing requirements in subsection 30.11(2) of the CITT Act, the time limits in section 6 of the Regulations and rule 96 of the Rules concerning filing.

Notwithstanding the Department's jurisdictional argument relating to the second complaint, the Department made submissions with respect to the substantive grounds that it raises. Concerning Corel's allegation that the Department unreasonably refused to extend the bid closing date, the Department reiterated that this was not a new or different complaint from the one stated in paragraph (ii) on page 15 of the June 12, 1998, complaint and submitted that the extension was not granted due to the urgency of the requirement.

After admitting that Corel was not told that sample files would be shown at the site visit on June 12, 1998, the Department submitted that this was because it was not intended to show the sample files to potential suppliers and that none were shown to any bidders. The Department admitted that Corel might have been misled on this point by the "unfortunately" worded statement in amendment No. 5 to the RFP.

However, the Department submitted that it believed that the SAIC report presented sufficient information to evaluate the conversion task and to prepare a bid. The Department added that the files provided to Corel on July 2, 1998, were never intended to be representative of all the various complexities of files to be converted. That information, the Department submitted, was provided in the SAIC report.

The Department submitted that the observations of the authors of the SAIC report that the volume information in the report should be treated with some care were irrelevant, given that amendment No. 3 to the RFP specified the volume of files to be converted and that those volumes were reduced to the lowest reasonable level. Potential bidders were all given the best information available, and this is all that Article 1013(1) of NAFTA and Article XII(2) of the AGP require. The information need not be to the satisfaction of bidders. The government cannot fairly be required to provide more than all the information that it has at its disposal with regard to any requirement.

Concerning the risk associated with the conversion requirements, the Department noted that Corel failed to mention the changes made to the pricing structure in amendment No. 3 to the RFP. The Department submitted that, in reducing risk to the bidders, the government assumed greater risk in order to improve the possibility of a successful competition.

In its additional comments of September 11, 1998, the Department submitted that, contrary to Corel's assertion, it never indicated that the sample files available for viewing by bidders on July 2, 1998, were meant to constitute a representative sample of files. As well, the Department submitted that it never discredited or intended to discredit the authors of the SAIC report. All it did was to comment on the author's words of caution within the context of the revised pricing scheme.

With respect to the consultant from Hill and Knowlton, the Department indicated that it had informed Corel by letter dated July 15, 1998, that the firm had registered as a lobbyist for Microsoft on February 1, 1996, for a single event, and that the registration had been withdrawn on July 8, 1998. Furthermore, Revenue Canada was not aware of this relationship when it retained the consultant in question, and it terminated the contract for his services as soon as the matter was brought to the government's attention.

Microsoft's Position

Microsoft substantially agreed with the facts, as stated in the GIR, and indicated that, to the best of its knowledge, it had received no preferential treatment with respect to this solicitation. Microsoft submitted that the initial selection in 1992 of the Microsoft OA suite was made in a manner consistent with the regulatory procurement procedures and policies of the federal government then in effect and that the continued acquisition of Microsoft OA licences occurred on an incremental, as needed basis under the relevant standing offers. Microsoft submitted that the use of standing offers was consistent with public and private procurement practices and was essential to allow purchasers the flexibility to buy constituent components of information technology systems.

With respect to the issue of "contract splitting," Microsoft submitted that, by definition, "contract splitting" could only occur when, from the outset, an entire enterprise-wide information technology solution was determined and, subsequently, was artificially segmented to distort the true nature of the procurement project, i.e. to make the procurement of a "whole system" misleadingly appear to be the procurement of several distinct "parts." Since the procurement of Microsoft OA licences commenced as the *bona fide* acquisition of several distinct software packages within a common platform, Revenue Canada's purchase of

Microsoft OA licences did not begin as a "whole system" procurement. Microsoft submitted that the incremental purchasing of individual component desktop applications, of a value and nature that were authorized by the relevant standing offers, could not, by definition, be considered contract splitting. At the time that these purchases were made, they were clearly in connection with individual desktop applications and not in the context of an enterprise-wide "whole system" application.

Microsoft submitted that, over time, the aggregate acquisition of such distinct and individual Microsoft software licences formed a "critical mass" of common platform software raising increased potential for network efficiencies. Apparently, it was at this point, i.e. where such critical mass became evident, that the decision was made to acquire such further information technology as an enterprise-wide solution and to open it up to other software suppliers such as Corel.

Turning to the issue of the SAP mandatory requirement, Microsoft submitted that it was a generally accepted industry practice to require that an enterprise-wide solution be compatible with other information technology that was already used by the purchaser. Accordingly, the requirement that the OA suite be SAP compliant cannot be said to be unreasonable in the circumstances or to have been introduced for the purpose of excluding Corel from the competition. Moreover, Microsoft submitted that the inclusion of conversion costs and software licences in the same RFP was also common industry practice and was reasonable in the circumstances to achieve the most cost-effective information technology for Canadian taxpayers. In this regard, Microsoft submitted that the Department's decision to reduce the impact of conversion and training costs by only considering 50 percent of such costs for bid evaluation purposes was primarily made to benefit competitors of Microsoft, such as Corel. Such a practice, Microsoft submitted, could be cause for a complaint of discriminatory treatment against Microsoft in its own right.

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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the trade agreements.

In the Tribunal's view, the first matter that it must consider is the Department's objections to Corel's second complaint. The Department has submitted that this complaint should not be considered by the Tribunal because it represents an attempt to circumvent the CITT Act, the Regulations and the Rules by adding a request for relief in damages for loss of profit that was not claimed in Corel's first complaint. Furthermore, because the Tribunal has rescinded its postponement of award order, it is not within the Tribunal's jurisdiction to recommend either reissuing this solicitation or terminating any contract awarded by the Department.

The Tribunal was satisfied that Corel's second complaint meets the requirements of the CITT Act and the Regulations and that it documents, in a timely manner, a reasonable indication of two possible breaches of the trade agreements not raised in the first complaint, namely: (1) that, by refusing to extend the date by which bidders had to submit proposals, the Department may have breached the provisions of Article 506(5) of the AIT that deals with the time period to be provided to bidders to submit proposals; and (2) that, in addressing Corel's concerns after June 12, 1998, the Department may have failed to provide sufficient information to Corel to allow it to make a responsive bid. The Tribunal is also of the view that, in

submitting its second complaint, Corel is not bound by the remedy that it sought in the first complaint. Furthermore, under subsections 30.15(2) and (3) of the CITT Act, the Tribunal is not limited, in framing a remedy, to only the relief sought by a complainant. In addition, the Tribunal finds no basis in the CITT Act for the Department's suggestion that subsection 30.13(4) of the CITT Act operates to limit the remedies that the Tribunal is able to consider as being "appropriate" under subsections 30.15(2) and (3) of the CITT Act in cases where the Tribunal has rescinded a postponement of award order. Accordingly, the Tribunal will consider Corel's complaint of July 14, 1998, on its merits.

Having determined that it has jurisdiction to deal with both complaints, the Tribunal turns to address the issue of whether the information provided to Corel was sufficient to allow it to submit a responsive bid. The Tribunal will then consider the grounds raised in the second complaint relating to the time period for bidding. Next, the Tribunal will consider whether the RFP was structured in a manner that discriminated against bidders not offering Microsoft OA suite products, particularly in the context of conversion costs, the SAP requirement and the performance bond. The Tribunal will then briefly address the issue of bias relating to the consultant hired by Revenue Canada, before concluding with a discussion of the Tribunal's recommendations relating to remedies.

As noted above, the issue of sufficiency of information was raised in both complaints. The Tribunal will examine the issue in the context of each complaint in turn. This entails considering the facts as they relate to the period prior to June 12, 1998, i.e. the date on which the first complaint was filed, separately from the facts arising between that date and July 14, 1998, the date on which the second complaint was filed.

Article 1013(1) (Tender Documentation) of NAFTA provides, in part, that "[w]here an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders ... The documentation shall also include: … (g) a complete description of the goods or services to be procured." Article XII(2) of the AGP contains essentially the same requirements.

In the Tribunal's view, the evidence shows that, by June 12, 1998, it was clear that problems with the information available relating to conversion costs were real and represented a significant problem for potential suppliers that might bid an OA suite other than Microsoft. However, the Department did recognize that it had problems and, prior to June 12, 1998, it embarked on a process to deal with them. In addition to commissioning the SAIC report, the government was making efforts to identify more clearly and to reduce the number of files that would need conversion. It was also attempting to provide clearer information with respect to training requirements and was arranging to provide bidders with the opportunity to view sample files. Furthermore, the Department was still considering requests to change the basis for pricing file conversion costs.

While the Tribunal agrees that Corel had not received sufficient information up to that point to bid, the Tribunal finds that, in respect of File No. PR-98-012, the matter was not yet concluded by June 12, 1998, and that the government was entitled to complete its efforts to provide better information.

The Tribunal is of the view that the evidence before it shows that the Department began this solicitation without having developed critical information that it could reasonably have foreseen being required by bidders that did not offer Microsoft OA suite products. In particular, information that would detail the file conversion effort in a meaningful way was missing. Moreover, the Tribunal notes that it is only subsequent to representations made by suppliers, including Corel, and a few days before the issuance of the formal RFP that the Department hired SAIC to determine the scope of the conversion effort. It appears to the

Tribunal that Revenue Canada and the Department had no clear idea, at the time, of the effort involved in such a conversion. The Tribunal also notes that SAIC was given a tight time frame to produce its report, which was submitted to Revenue Canada on June 3, 1998.

With respect to events occurring after June 12, 1998, the Tribunal is of the view that the central piece of information that potential bidders received after this date was the SAIC report. The report makes clear that the information provided by the Department in the solicitation documents to permit bidders to estimate the effort and costs involved to convert in excess of 800,00030 files from a particular OA suite to another one is "subject to at least four compounding sources of error31" including the division of files into simple and complex files and extrapolation errors. Therefore, according to the same authors, the information in the report should be used with care in assessing conversion effort as "any results may have an error which could be significant.32" In addition, the tight time frame given to SAIC necessarily impacted on the reliability and usefulness of the risk analysis in the report. According to SAIC, given more time, "it would have been possible to further analyze the data to arrive at a better estimate of its accuracy.33"

In light of these comments in the report, it was reasonable for Corel to take the substance of these notes seriously. While the Department did take action in an effort to minimize the risk to bidders, in the Tribunal's opinion, these actions were not sufficient to allow Corel to make a responsive bid. More specifically, Corel still did not have reliable information which clearly identified the type and nature of the files which actually had to be converted, data critical to an effective estimate of the conversion effort in terms of time and costs. Furthermore, the situation was not helped by the release of sample files on July 2, 1998. Indeed, Revenue Canada and the Department were unable to assert how representative the sample files were by way of complexity, as these had not been selected with this objective in mind.

The Tribunal recognizes that it is not always possible to provide perfect information to bidders and that, at times, potential suppliers may have to assume an element of risk in this regard. However, this does not mean that the Department can leave bidders without critical information over which it and its client department, Revenue Canada in this case, have control, particularly where, as here, the information relates to a very significant portion of the value of a bid.34 In addition, in the Tribunal's opinion, reasonable planning for this procurement would have permitted the Department and Revenue Canada to identify and provide the critical information in time to allow for proper bidding.

For these reasons, the Tribunal finds that, with respect to File No. PR-98-014, the Department failed to provide, in the tender documents, all the information, including a complete description of the services to be procured, necessary to permit suppliers to submit responsive tenders and, therefore, breached Article 1013(1) of NAFTA and Article XII(2) of the AGP.

As noted above, the other substantive issue raised in File No. PR-98-014 relates to the Department's denial of Corel's request to have the time for submission of a bid extended. Article 506(5) of the AIT states

30. As noted, this number was subsequently reduced to approximately 94,500 files. *Supra* note 23.
31. *Supra* note 25.
32. *Ibid.*
33. SAIC report, June 3, 1998, para. 4.3.3.
34. Revenue Canada's own estimate of file conversion costs was between $5 and $10 million prior to the 50 percent reduction indicated in amendment No. 3 to the Request for Proposal. See Government Institution Report, para. 116 and the Department's submissions dated September 11, 1998, para. 23.

that "[e]ach Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement."

The Tribunal notes that Corel requested an extension of time to bid on June 29, 1998. The Department is correct to state that this request is tied to the issue of sufficiency of information. However, this does not mean that these matters, though related in the circumstances of this case, cannot give rise to discrete breaches of the trade agreements. This is so because it is the lack of information that led Corel to request an extension of the time to bid. In light of the problems that had arisen with respect to the information being provided in respect of conversion costs and faced with a specific request to extend the time for submitting a bid, the Department had the option of addressing these problems through an extension of time which would have allowed for further information to be developed, provided to potential bidders and then incorporated in their bids, if they decided to bid with that information.

In amendment No. 5 to the RFP, issued on June 30, 1998, the Department advised potential bidders that, due to the urgency of the solicitation, it had no intention of extending the time for bidding. In the Tribunal's opinion, this must be examined not only on its own but also in light of the information problems that existed. Considering the issue of "urgency," on its own, in the Tribunal's view, the evidence shows that, to the extent that an urgent situation existed, it resulted primarily from the actions of the Department and Revenue Canada. As early as 1988, Revenue Canada was discussing issues relating to year 2000 compliance and, by September 1996, with the approval of the RC7 project, Revenue Canada had in place a comprehensive strategy to address the situation, which it proceeded to implement. Revenue Canada itself, on a number of occasions over the last year, spoke optimistically of achieving year 2000 compliance. In addition, the Tribunal notes that Revenue Canada has already announced plans to conduct a full year of testing, from January 1, 1999, to the year 2000, as part of completing the RC7 project.35 In light of the length of time that Revenue Canada has been addressing the year 2000 situation, the Tribunal is not persuaded that the urgency described in the RFP and in the various submissions made by the Department and Revenue Canada in these matters could not have accommodated a reasonable extension of the period in which to submit bids, thereby possibly attending to the file conversion and the SAP compatibility issues. In the Tribunal's view, and mindful that the decision to compete this requirement had already been delayed until April 1998, by refusing to extend the bidding period in these circumstances, the Department breached Article 506(5) of the AIT by failing to provide Corel with a reasonable period within which to bid.

Returning to File No. PR-98-012, the Tribunal will now address the issues relating to allegations of discrimination. Article 1008(1)(a) of NAFTA provides that each party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner. Article VII(1) of the AGP contains essentially the same requirement. In addition, Article 501 of the AIT provides, in part, that the purpose of the procurement chapter in that agreement "is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs."

As noted, the allegations of discrimination relate to the structure of the RFP and, in particular, to its evaluation framework and to the manner in which the procurement was carried out by the Department. In effect, Corel is alleging that a number of issues, such as how to deal with conversion costs, the mandatory SAP requirement, the bond requirement and other matters, have led to a situation where there are, in effect, two classes of bidders; those in the class offering alternative OA suites to the Microsoft OA suite are being treated unfairly to the extent that they cannot effectively bid for the solicitation.

35. Government Institution Report, para. 123.

In addressing these issues, the Tribunal notes that, in this case, it can only consider the issue of discrimination relating to this procurement, i.e. Solicitation No. 46577-7-1709/A. The Tribunal emphasizes this point because it wishes it to be clear that the issue of whether the acquisition of more than 25,000 Microsoft OA suite licences by Revenue Canada since 1991 without competition is not before the Tribunal. However, as acknowledged by the Department, the effect of these acquisitions, and the Department's recognition that they must be addressed in the RFP, is before the Tribunal. In fact, all the issues raised by Corel with respect to discrimination come together in the single issue of whether the Department has sufficiently addressed this situation in the RFP with respect to bidders offering alternative OA suites to the Microsoft OA suite. For the reasons that follow, the Tribunal concludes that the Department has not succeeded in this effort.

The Tribunal is of the view that, in principle, the government is entitled to state its requirements fully and completely, including the possibility that this may result in conversion cost considerations for bidders other than the incumbent. The Tribunal is also of the view that, in principle, an incumbent should not be penalized because of the experience and knowledge that it has acquired in that capacity. Indeed, where goods and/or services have been acquired in an appropriate manner over a period of time, there is no obligation to offset the effect of incumbency in the formulation of solicitations and, subsequently, in the evaluation of proposals. However, as acknowledged by the Department, these are not the circumstances that are presented in this case. The circumstances here raise two questions: (1) how should the government rectify situations where incumbency has not arisen in an appropriate manner; and (2) were the steps taken to rectify such situations sufficient. The Tribunal does not agree with the Department that *Sybase* is relevant in circumstances where advantages resulting from incumbency have not arisen in an acceptable manner.

The Tribunal does not want to minimize the significance of the Department's efforts to try to make this procurement fair and competitive. The Department and the TBS have not only recognized the danger to competition if the use of standing offers is abused but also set out in their letter of August 28, 1997, how departments can proceed in an appropriate manner in purchasing software. The Tribunal acknowledges the ongoing use of standing offers by the government as a method of procurement, provided, of course, that method is used in accordance with the trade agreements. This would include competing standing offers, where appropriate, and ensuring that call-ups meet the terms of the standing offers and related policies. Furthermore, the Department and the TBS have indicated their determination to enforce this policy by requesting that Revenue Canada's requirement for an OA suite year 2000 compliant enterprise licence be open to competition and that the price of any bid proposing Microsoft as its OA suite be augmented, for evaluation purposes, by the full value of the RC7 Microsoft OA upgrades/licences procured by Revenue Canada after August 28, 1997. These actions and the adjustments made during the bidding process to the volume and importance of the file conversion effort and training costs as evaluation factors reflect significant efforts. The Tribunal is not persuaded, however, that these efforts were sufficient.

For example, the Department offers no coherent rationale for establishing the file conversion and training costs at 50 percent of their value in the evaluation process. It is simply not clear why this percentage was chosen and how specifically the risks to bidders and the risks to the government and taxpayers were balanced within the context of effective competition. In addition, the Tribunal is of the opinion that, throughout this procurement process, the actions of the Department and Revenue Canada, while presumably meant to be helpful to all bidders, have been less than that at times. The delaying of a competitive procurement for many months after the RC7 project was approved in 1996, the continued procurement of licences/upgrades through the Microsoft NMSO by Revenue Canada after the letter of August 28, 1997, and the hurried initiation of this solicitation when critical information had not been developed resulted in

unnecessarily tight time frames which created unreasonable difficulty for bidders. With respect to the SAP compatibility requirement, this hurried process also seems to have contributed to the Department inadequately assessing what it came to identify as a mandatory requirement and then making this change without adequate explanation. The failure to communicate in the solicitation documents the number and type of licences/upgrades purchased by Revenue Canada after August 28, 1997, and their cost, so as to assist bidders to discount their prices as they may deem appropriate, and the refusal to extend the bidding period also point to measures having been taken by the Department and Revenue Canada which had a significantly different impact on bidders proposing Microsoft products as opposed to bidders offering alternative products, such as Corel products. Finally, while a performance bond requirement is not inherently unreasonable, the Tribunal is of the view that it became unreasonable in the circumstances of this case. This is particularly so for bidders that would offer alternative products, given the impact that the lack of clear information discussed above could have on the eventual cost of performing this contract.

In consideration of all of the above, the Tribunal is of the view that, when taken altogether, the evidence relating to the many issues regarding discrimination reflects a situation where, in fact, bidders offering alternative OA suite products have been discriminated against to the extent that it cannot be said that this procurement was conducted in accordance with Article 1008(1)(a) of NAFTA, Article VII(1) of the AGP and Article 501 of the AIT. Therefore, the Tribunal concludes that Corel's complaint in File No. PR-98-012 is valid.

Before turning to the issue of the appropriate remedy in the circumstances of this case, the Tribunal wishes to briefly comment on the issue of Revenue Canada's hiring of a consultant from Hill and Knowlton. While the information before the Tribunal relating to this issue shows that Revenue Canada and the Department were less than diligent in determining whether the hiring would create a problem, there is no evidence that this relationship impacted the drafting of the RFP and the subsequent amendments to the RFP. However, if different circumstances had been established and if the employment contract in question had not been terminated immediately upon the apparent conflict coming to light, the Tribunal may have approached this issue differently.

Where the Tribunal determines that a complaint is valid, in recommending an appropriate remedy, it is required, pursuant to subsection 30.15(3) of the CITT Act, to consider a number of circumstances relevant to the procurement. In the present instance, the Tribunal is of the view that serious deficiencies in the procurement process are apparent. In essence, the Department has recognized that, in competing a procurement of an enterprise licence for Revenue Canada, the problems existing as a result of how the present incumbency arose had to be reflected in how non-incumbent bidders were treated. For the reasons given above, the Tribunal concludes that the Department failed in these efforts. In the Tribunal's view, not only is the prejudice to Corel in this instance real but there is also prejudice to the integrity of the Canadian procurement system.

Accordingly, the Tribunal's preferred remedy, in this instance, is for the Department to start this solicitation again in accordance with the provisions of the trade agreements, paying particular attention to further reducing the impact of conversion costs. The Tribunal, however, must also be mindful of the particular circumstances of this solicitation, particularly, the requirement for Revenue Canada to meet its year 2000 compliance target, even though the "urgency" to which this currently gives rise is primarily of its own making. Furthermore, the Tribunal must consider the extent to which this requirement might have already been performed. Therefore, the Tribunal recommends, as an alternative, that the Department present to the Tribunal a proposal for compensation, developed jointly with Corel, that recognizes the lost

opportunity that Corel experienced by being unable to make a responsive bid in this case and the possibility that it may have been awarded this solicitation. Furthermore, the proposal for compensation should address whether further compensation should be awarded in the context of paragraphs 30.15(3)(*a*), (*b*) and (*c*) of the CITT Act.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the CITT Act, the Tribunal determines that the complaint in File No. PR-98-012 is valid because Solicitation No. 46577-7-1709/A was not conducted in accordance with Article 1008 (Tendering Procedures) of NAFTA, Article VII (Tendering Procedures) of the AGP and Article 501 (Purpose) of the AIT. The Tribunal also determines that the complaint in File No. PR-98-014 is valid because Solicitation No. 46577-7-1709/A was not conducted in accordance with Article 1013 (Tender Documentation) of NAFTA, Article XII (Tender Documentation) of the AGP and Article 506 (Procedures for Procurement) of the AIT.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department issue a new solicitation for the procurement at issue. The new solicitation should be conducted in accordance with the provisions of NAFTA, the AGP and the AIT. More specifically, in the particular circumstances of this procurement, it is recommended that, in conducting the new procurement, the Department consider further reducing the impact of the conversion costs in evaluating proposals, in an attempt to provide for effective competition.

In the alternative, if the Department decides not to issue a new solicitation, the Tribunal recommends that the Department present to the Tribunal a proposal for compensation, developed jointly with Corel, that recognizes the lost opportunity that Corel experienced by being unable to make a responsive bid in this case and the possibility that it may have been awarded this solicitation. Furthermore, the proposal for compensation should address whether further compensation should be awarded in the context of paragraphs 30.15(3)(*a*), (*b*) and (*c*) of the CITT Act. This proposal is to be presented to the Tribunal within 30 days of receipt of the Tribunal's reasons.

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

Pierre Gosselin
Pierre Gosselin
Member