REGULATORY AND TRADE DEVELOPMENTS

DECISION RELEASED IN SYBASE CANADA LTD. COMPLAINT TO CANADIAN INTERNATIONAL TRADE TRIBUNAL

Editors' Note: This recent decision of the CITT provides useful insight into the Tribunal's interpretation of both the letter and the spirit of the limited tendering exemption to the full tending requirements under Canada's trade agreements (NAFTA and the WTO Agreement), and the federal-provincial Agreement on Interprovincial Trade.

The decision may be particularly helpful to suppliers of computing equipment and software, and other products, in assessing the limits to continuing federal government reliance on an established supplier to meet the government's evolving requirements for a particular class of product through sole-sourcing. The following is the text of the Tribunal's decision.

Background

On March 17, 1997, Sybase Canada Ltd. ("Sybase") filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the "CITT Act") concerning the intent of the Department of Public Works and Government Services (the "Department") to procure, on a sole-source[2] basis, a departmental license for a Relational Database[3] Management System ("RDBMS") for up to 55,000 users, plus maintenance over a five-year period from Oracle Corporation Canada Inc. ("Oracle") for the Department of National Defence ("DND") (Solicitation No. W8474-6-QQD7).

Sybase alleged that the proposed increase in the number of users, from 30,000 to 55,000, does not represent an incremental utilization of existing applications using Oracle RDBMS software, but rather additional uses for this software, which can readily be satisfied by competitive software offerings, including those of Sybase. It further alleged that, for lack of resources, no technical evaluation of alternatives was carried out by DND. This acquisition allegedly was justified on the basis that Oracle licenses would be free, while the use of software from other database suppliers would involve acquisition costs for new licenses, and that it would enable DND to get some value out of all the money that it has already spent with Oracle. For the above reasons, Sybase alleged that the Department has not carried out this procurement in accordance with the provisions of Article 1016(1) of the *North American Free Trade Agreement*[4] ("NAFTA").

Sybase requested, as a remedy, that the Advance Contract Award Notice[5] (the "ACAN") be cancelled and that the requirement for the additional database software be subject to true, open competition.

CANADIAN COMPETITION RECORD

Inquiry

On March 20, 1997, the Canadian International Trade Tribunal (the "Tribunal") determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[6] (the "Regulations") had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of NAFTA, the *Agreement on International Trade*[7] (the "AIT") and the *Agreement on Government Procurement*[8] (the "AGP"). The same day, the Tribunal issued an order postponing the award of any contract in connection with the above-mentioned solicitation, until the Tribunal determined the validity of the complaint. On March 24, 1997, the Tribunal granted Oracle leave to intervene in this case. On April 23, 1997, the Department filed with the Tribunal a Government Institution Report (a "GIR") in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[9] On May 5, 1997, Sybase filed a motion with the Tribunal, requesting the production of additional documents and information relevant to this case as well as a time extension of the period in which to file comments on the GIR. On May 30, 1997, the Tribunal directed the Department to produce additional documents and information. The additional information and documents were filed with the Tribunal by the Department on June 23 and 27, 1997. On July 9, 1997, Sybase and Oracle filed comments on the GIR with the Tribunal. On July 15, 1997, Sybase filed with the Tribunal comments on the submission made by Oracle and, on July 22, 1997, the Department submitted comments on Sybase's comments. On July 25, 1997, Sybase filed with the Tribunal its response to the Department's comments of July 22, 1997.

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

Procurement Process

On February 19, 1997, the Department published an ACAN for this requirement in *Government Business Opportunities* ("GBO") with a closing date of February 26, 1997. The ACAN identified the requirement as follows:

1. The Department of National Defence has a requirement to convert existing Oracle RDBMS licenses (30,000 estimated Current Users) to a Departmental license for up to 55,000 Users.

2. To provide maintenance for the above, as well as for existing licenses for all Oracle products licensed to DND for a five (5) year period beginning August 1, 1997. The maintenance will be covered by approximately five (5) yearly contracts, to be issued each year beginning August 1, 1997 or earlier.

The ACAN, in part, identified this solicitation as NAFTA and AGP tendering procedures. The procurement strategy was to be non-competitive for reasons of "Exclusive Rights."

On February 20, 1997, Sybase wrote to the Department objecting to this approach. It stated, in part, that "[t]he RDBMS environment is extremely competitive, and we believe our products meet or exceed the requirements of DND in every respect, and are very cost effective. Thus, we are concerned about both our opportunity to compete, and the Government's opportunity to derive the benefits from

open competition." On March 3, 1997, the Department responded to Sybase's objection indicating that, in this case, it was impractical to consider alternate RDBMS products due to interfacing and interchangeability issues associated with modifying existing systems to suit a different RDBMS. It also stated that Article 1016(2)(d) of NAFTA allowed for situations such as this one.

On June 10, 1997, DND obtained a document (two pages) from the GartnerGroup which addresses, in general terms and summarily, factors such as costs, risks and the pressures and deterrents associated with migrating from one RDBMS to another.

The following provisions of Article 1016 of NAFTA apply in this case:

1. An entity of a Party may, in the circumstances and subject to the conditions set out in paragraph 2, use limited tendering procedures and thus derogate from Articles 1008 through 1015, provided that such limited tendering procedures are not used with a view to avoiding maximum possible competition or in a manner that would constitute a means of discrimination between suppliers of the other Parties or protection of domestic suppliers.

2. An entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable:

...

(b) where, for works of art, or for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information or where there is an absence of competition for technical reasons the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

...

(d) for additional deliveries by the original suppliers that are intended either as replacement parts or continuing services for existing supplies, services or installations, or as the extension of existing supplies, services or installations, where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services, including software to the extent that the initial procurement of the software was covered by this Chapter.

The following provisions of Article XV of the AGP also apply in this case:

1. The provisions of Articles VII through XIV governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers.

...

(b) when, for works of art or for reasons connected with protection of exclusive rights, such as patents or copyrights, or in the absence of competition for technical reasons, the products or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

...

(d) for additional deliveries by the original supplier which are intended either as parts replacement for existing supplies, or installations, or as the extension of existing supplies, services, or installations where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services. [It is the understanding that "existing equipment" includes software to the extent that the initial procurement of the software was covered by the Agreement].

Validity of the Complaint

Sybase's Position

Sybase indicated that its decision to seek a review of the proposed DND procurement had not been taken lightly. Indeed, it considers DND a valued customer and its preference has been, and will continue to be, to gain market access through the established merits of its products. However, Sybase is of the view that there exists a profound misunderstanding on the part of DND of the current highly competitive nature of the RDBMS market. If not vigorously challenged, this procurement, given its sheer magnitude, could, Sybase submits, set an inappropriate precedent that would effectively preclude any meaningful RDBMS competition throughout the federal government.

In its submission, Sybase disagrees with the Department's characterization of the costs related to the Individual Training Management Information System (the "ITMIS") application. As well, it asserts, based upon the evidence provided by DND, that the alleged 30,000 Oracle user licenses which DND proposes to replace with a departmental license appear to number only 819. It submits that DND's suggestion that it needs to add over 7,000 additional Oracle user licenses within fiscal year 1997-98 is excessive, unfounded and unsupported by any evidence. Similarly, DND's suggestion that it has already acquired 10,000 Oracle full development licenses is unreasonable and excessive on its face, given the size and nature of DND.

Sybase submits that the considerable monetary consideration provided by DND to Oracle for this procurement confirms that DND will be acquiring significant new database functionality from Oracle over the term of the license agreement. This consideration, Sybase submits, will constitute an irresistible incentive to DND to continue to source all future database requirements exclusively from Oracle without competition. To put it plainly, having put its foot in DND's door, Oracle would have a never-ending symbiotic relationship with DND.

Furthermore, Sybase submits that Article 1016(2)(d) of NAFTA does not permit sole-sourcing in this case because the procurement goes beyond what might reasonably be viewed as replacement parts, continuing services or extension of existing supplies. Moreover, limited tendering is not permitted in this instance because Oracle RDBMS products and services are interchangeable with those of Sybase and probably many other major RDBMS suppliers. In addition, Sybase submits that the work or cost assumed by DND to be related to sourcing RDBMS products from more than one supplier is not relevant to determining lack of interchangeability for the purpose of NAFTA. To give weight to such a claim, Sybase submits, would gut Article 1016(2)(d) of any

limiting effect and give federal departments carte blanche to sole-source any class of product. Whether or not the cost of Sybase products and services would be higher than the Oracle cost can only be properly determined through a competitive bidding process. In many cases, Sybase submits, suppliers will absorb transitional or educational costs in order to gain access to a customer heretofore controlled by another supplier.

Concerning the application of Article 1016(2)(b) of NAFTA in this instance, Sybase submits that it does not provide a valid justification for sole-sourcing. Indeed, if proprietary rights are an issue with respect to interchangeability, Sybase submits that it is within the rights of competitive bidders, during an open, competitive procurement, to elect to replace proprietary development licenses as part of the bid process in order to ensure that the issue of proprietary rights is no longer a factor. Otherwise, in every single instance where a software developer is "first in the door," Article 1016(2)(b) could be successfully relied upon. This, according to Sybase, is simply not the case, and is not a situation against which NAFTA was meant to protect. Moreover, Sybase states that DND has now in its possession at least one other RDBMS application development tool, Sybase PowerBuilder, that permits DND to develop RDBMS applications to be used with Oracle 7 and, for example, Sybase System 11 without prior authorization or licensing by Oracle.

Sybase further submits that this procurement, contrary to the provisions of Article 1016(1) of NAFTA, is designed to permit DND to avoid considering not only competing its ongoing RDBMS requirements but, more importantly, to consider how to do so appropriately. DND's exclusive and inappropriate reliance on the Oracle National Master Standing Offer[10] (the "NMSO") explains this situation. Indeed, Sybase further submits that the continuation of the NMSO as a basis for sole-sourcing an indefinite number of individual Oracle user licenses, in and of itself, is contrary to Article 1016(1). In this context, Sybase submits that the Tribunal should recommend that DND not substitute continued sole-sourcing of Oracle products under the NMSO in the event that the departmental license is not implemented in whole or in part.

Sybase also submits that DND failed to consider whether or not there was a valid interchangeability argument to be made vis-à-vis this procurement until after Sybase filed its complaint with the Tribunal and, to date, it has failed to address functional interchangeability issues and options in relation to this specific procurement. After stating that database migration to another supplier (the primary subject matter of the GartnerGroup document) is not the subject of this complaint, Sybase submits that it is only interested in ensuring that DND establishes and maintains a level playing field with respect to future RDBMS requirements, including, but not limited to, new applications, new and replacement services, new projects and project upgrades.

In its comments on Oracle's submission to the Tribunal, Sybase submits that the procurement referred to by Oracle in its submission is substantively different from the one in dispute in this case. Sybase also submits that the fact that a large number of contracts might have been issued under a limited tendering procurement approach since NAFTA is in place is irrelevant, particularly if any of those contract awards have been contrary to the relevant provisions of NAFTA. Furthermore, if limited tendering practices in other procurements may not have been conducted in accordance with

the provisions of NAFTA, it should not prevent a potential supplier from challenging this practice when it feels that it is proper to do so.

In response to the Department's comments of July 22, 1997, Sybase submits that the Department has never provided evidence to support its assertion that the current Oracle RDBMS licenses in place at DND number 30,000 users. Sybase further submits that the method of counting users by application used raises fundamental questions relative to the acquisition of new functionality, for example. Concerning the addition of over 7,000 user licenses in fiscal year 1997-98 and the question of the existence of the 10,000 Oracle full development licenses in DND, Sybase submits that, though possibly related to other procurements, past and future, these matters raised by the Department are nevertheless relevant to the matter at hand. Finally, on the issue of the interchangeability, Sybase submits that the Department continues to miss completely the gist of its argument.

The Department's Position

The Department briefly outlined the history of RDBMS and described the various licensing arrangements that pertain to such systems.[11] The Department then stated that DND currently holds some 30,000 Oracle user-based licenses which are restricted either by operating system ("OS"), number of servers or central processing unit ("CPU") limitations and for which Oracle owns all intellectual property rights (patents, exclusive rights and proprietary information). For this reason, the Department submits, it is not possible to compete any change to the terms of the existing licenses without negotiating with Oracle. In addition, the Department states that DND presently has approximately 10,000 full development licenses for Oracle RDBMS software and that it has a current requirement to provide over 7,000 new users access to existing applications.

Finally, DND estimates its future access requirements for new Oracle RDBMS applications developed internally or as a result of competitive requirements to be some 25,000 new users. At present, DND has hundreds of applications developed or running on the Oracle RDBMS and, the Department submits, "[A] change to a Sybase or other RDBMS suppliers would compel DND to procure equipment and services not meeting the requirements of interchangeability with the existing applications ... and would require considerable expenditures of several million dollars, to rewrite existing applications to new databases resulting in an impractical and unworkable situation." The Department further submits that, though a conversion from Oracle to Sybase was done at significant cost two years ago in respect of the ITMIS application, there is no technical impediment now necessitating rewriting existing Oracle applications to another RDBMS as was the case then.

Concerning the maintenance portion of the requirement, the Department states that DND's objective is to combine all its maintenance requirements so that all its Oracle applications are making use of the increased features and functionality of the most current Oracle products.

The Department submits that, because Oracle owns the patents, exclusive rights and proprietary information for the Oracle RDBMS and the user-based licenses which DND needs to convert to a departmental license, this license can only be supplied by Oracle. No substitute exists.

Consequently, the Department submits that the use of the limited tendering procedures set out in Article 1016(2)(b) of NAFTA, Article XV(1)(b) of the AGP and Article 506(12)(a)[12] of the AIT is justified under the circumstances. Moreover, the Department submits that the provision of the departmental license that permits the addition of up to 25,000 new users is also consistent with the provisions of Article 1016(2)(d) of NAFTA, Article XV(1)(d) of the AGP and Article 506(12)(a) of the AIT. Indeed, a change of supplier would compel DND to procure equipment or services which would require rewriting hundreds of applications developed or running in the Oracle RDBMS because of the very real issue of a lack of interchangeability and compatibility between the two systems.

Concerning Sybase's allegation that new additional uses for the Oracle RDBMS type of software can readily be satisfied by competitive software offerings, the Department submits that: (1) the development by DND of additional new applications is provided for pursuant to the terms of some 10,000 full development licenses for Oracle RDBMS software already held by DND or through future competitive offerings; (2) the requirement to provide new users with access to new applications that use the Oracle RDBMS software must be obtained from Oracle, as holder of exclusive intellectual property rights; and (3) new software applications developed in the Oracle RDBMS software are not interchangeable with other RDBMS software such as Sybase without major conversion costs.

The Department further submits that the deployment of up to 25,000 additional Oracle RDBMS users is not an immediate need (the currently known requirement for fiscal year 1997/98 is over 7,000 users) and will only materialize over time. Moreover, the Department submits that, should DND be prevented from converting its existing licenses to a departmental license, it will have to pay significant transfer fees to Oracle as well as to buy at least 7,000 new user licenses in fiscal year 1997/98. These costs, the Department submits, would be equivalent to the total costs of the departmental license.

Concerning Sybase's allegation that, for lack of resources, no technical evaluation of alternatives has been carried out by DND, the Department submits that the conversations referred to by Sybase are quoted out of context as indicated in letters from two of the DND officials quoted. Accordingly, the Department submits that appropriate consideration was given to possible alternatives, but, for the reasons outlined above, they were rejected.

In its comments on Sybase's comments, the Department, after reiterating that the current Oracle licenses in DND authorize use by approximately 30,000 users, indicates that a user is counted for each connection to an application. For example, an individual who uses six applications will be counted as six users. The Department also submits, in relation to the number of additional seats that it will be seeking in the current fiscal year and in relation to the number of full development licenses already bought by DND, that these matters fall outside of the current complaint. Finally, the Department disagrees with Sybase's conclusion that Sybase's RDBMS products are, in any event, demonstrably interchangeable with current and future DND RDBMS applications and core infrastructure, and can readily interwork with Oracle 7 RDBMS software. Sybase products, the Department submits, are not interchangeable without significant impact on DND's operations.

In sum, the Department submits that the requirement is in no way designed to avoid open and fair competition. The limited tendering provisions were used because of: (1) Oracle's exclusive proprietary rights; (2) the need to consolidate existing Oracle licenses into a more efficient and effective departmental license; (3) DND requirements for an extension of existing services in order to accommodate new users and new applications using RDBMS; and (4) the need to ensure interchangeability and compatibility with existing Oracle RDBMS developed products. To do otherwise, the Department submits, would be cost prohibitive, impractical, inefficient and unworkable.

Oracle's Position

In its submission, Oracle agrees with the substance and detail presented in the GIR regarding Oracle products and services in place at DND. It confirms the definitions and legal terms associated with Oracle licenses in use at DND and states that the GIR is an accurate and true representation of the present investment by DND in Oracle database technology.

Oracle submits that it, along with leading computer industry analyst firms, recognizes that significant efforts and costs are facing any organization contemplating conversion of its software applications written in Oracle, such as those in existence at DND, to a new Sybase system. In fact, Oracle submits that the GIR contains very conservative cost estimates in this respect. This information, Oracle submits, directly supports the Department's substantiation for a limited tendering procurement in this instance.

Oracle further submits that Sybase, having disputed the validity of the Department's reason for limited tendering in this instance, is nevertheless currently negotiating with the Department under a limited tendering procurement arrangement where the Department is invoking reasons substantially identical to those supporting this case, i.e. cost avoidance with respect to redevelopment work, re-training and disruption to current service levels. This action by Sybase, Oracle submits, is in contradiction to the primary argument presented by Sybase in this case.

Oracle submits that the principles and issues under review in this case are fundamental to its operations in the federal government marketplace. Limited tendering procurement is an accepted and long standing procurement practice, and Oracle seriously takes its obligations and commitments to uphold and deliver value to the Crown. Finally, Oracle submits that the decision of the Department to award a contract to Oracle on a limited tendering basis "is in line with hundreds of similar contract awards to Oracle and others since NAFTA regulations went into effect." There is, therefore, nothing amiss in this particular procurement or in the general practices by DND in this regard.

Tribunal's Decision

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA and the AGP.

Articles 1016(1), 1016(2)(b) and 1016(2)(d) of NAFTA and Articles XV(1)(b) and XV(1)(d) of the AGP set out certain conditions and circumstances under which limited tendering procedures may be used. Specifically, Articles 1016(2)(b) of NAFTA and XV(1)(b) of the AGP, in part, authorize limited tendering procedures for reasons connected with the protection of exclusive rights or the absence of competition for technical reasons, both circumstances resulting in the absence of reasonable alternative or substitute equipment and/or services. As well, Articles 1016(2)(d) of NAFTA and XV(1)(d) of the AGP authorize limited tendering for additional deliveries by the original supplier that are intended as replacement parts, the continuing servicing or extension of existing supplies, services or installation, where a change of supplier would compel the entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment and services.

It is important to note the provisions in Article 1016(1) of NAFTA and Article XV(1) of the AGP, to the effect that such derogations from open and selective tendering procedures (Articles 1008 through 1015 of NAFTA and/or Articles VII through XIV of the AGP), are not to be used to avoid maximum possible competition. Put another way, one can avoid the open procurement process only in certain limited cases. If however, one attempts to rely on those exceptions as a means of avoiding the "maximum possible competition" then such behaviour will not be permitted. It is the Tribunal's view that exceptions to the open competitive process should be read narrowly. Where evidence is presented to suggest that a limited tendering procedure is not justified, the onus will fall upon government departments to show that the use of these exceptions is, in fact and in law, appropriate. As stated in a decision by the Procurement Review Board of Canada,[13] Enconaire (1984) Inc. and Environmental Growth Chambers, Ltd:[14] "It is not for the complainant to demonstrate any case for a competitive solicitation. Competitive solicitations are the norm – the standard requirement of the rule. The true requirement is for the government to demonstrate the case for a sole sourcing." In assessing the merits of this case, the Tribunal adopts this position. Before considering this provision in 1016(1) of NAFTA, the Tribunal must first consider whether the exceptions relied upon by DND and the Department were appropriate.

The Tribunal notes that, the question of interchangeability within the meaning of Article 1016(2)(d) of NAFTA and Article XV(1)(d) of the AGP was not mentioned in the ACAN. The interchangeability reason was only first raised by the Department in its response of March 3, 1997, to Sybase's objection and was discussed extensively in the GIR. Moreover, the Tribunal notes that the Department's response to Sybase's objection is the only documentation held by the Department which contains, defines and discusses the term "requirements of interchangeability". In addition, the said response is the only documentation held by the Department which reaches a conclusion about Sybase's product vis-à-vis the interchangeability criterion. The Tribunal is surprised by the absence of any documentation or evidence which addressed product interchangeability. Notwithstanding this gap, the Department appropriately explained this situation when it stated, in its submission in response to Sybase's motion of May 5, 1997, for additional information and documents, that:

> [t]he issue of the interchangeability of Sybase and Oracle products is not relevant in the context of the current procurement except with respect to

> the issue of licensing. *The [Department's] position is that Sybase licensing cannot be substituted for Oracle licensing in the existing operating environment comprised of Oracle products* [emphasis added]. Therefore, documentation with respect to the interchangeability of products is not relevant to this inquiry.

The Tribunal will accept the Department's rationale on this point. It seems, therefore, that the Department never meant to invoke, nor has it used, interchangeability considerations within the meaning of Article 1016(2)(d) of NAFTA and Article XV(1)(d) of the AGP as a justification for resorting to limited tendering procedures in this instance.

In view of the aforementioned position relied upon by the Department in deciding to invoke the limited tendering procedures, the only reasons applicable in this instance are permitted by Article 1016(2)(b) of NAFTA and Article XV(1)(b) of the AGP. As a result of this admission, the Tribunal does not need to assess whether or not the exceptions provided in Article 1016(2)(d) of NAFTA and Article XV(1)(d) of the AGP were properly relied upon in this case.

The question the Tribunal is left with is the non-substitutability of equipment and services due to the protection of exclusive rights (licensing agreements) or the absence of competition for technical reasons. Exclusive rights, under the agreements, are presumably meant to protect an ongoing contract that one party has with a government department for the provision of ascertainable goods and services. It is important that the certainty that comes from such an arrangement not be affected. This is quite different, however, from saying that the provision of goods and services can continue *ad infinitum* under an exclusive rights agreement. In the Tribunal's view, whenever additional goods or services, not contemplated by the original contract which created the exclusive rights, are sought, they should be procured in an open competitive process. It may well be that, for other reasons, an open competitive process is not necessary, but those must be bona fide reasons.

The Tribunal accepts that the protection of exclusive rights is important, particularly where interference with these rights might impact on legitimately concluded business arrangements between parties. Equally important, especially in the information technology world, is the protection of proprietary or intellectual property rights. It may well be, however, that a third party, such as Sybase, may be able to offer a competitively priced, technologically compatible product without any infringements of Oracle's current licensing agreements with DND. Perhaps parties such as Sybase and Oracle might even agree to waive any impediment in a mutually beneficial agreement. The Tribunal does not know whether this or other options are viable, but, without open competition, one will never know.

Alternatively, during an open competitive procurement, Sybase could elect to replace the licensed product with technologically compatible products of its own. Such replacement would likely involve additional costs which a supplier may reflect in its bid price.

As Sybase has indicated in its submission, sometimes suppliers will absorb transitional or educational costs in order to gain access to a customer heretofore controlled by another supplier. In any event, in the opinion of the Tribunal, the decision to reflect such costs in one's proposal, if at all, is strictly within the suppliers' domain and constitutes an integral and essential part of competitive tendering. In the opinion of the Tribunal, in no circumstances and under no conditions whatsoever should assumed cost

considerations be used as a sole-source justification. For obvious reasons, NAFTA and the AGP do not allow such a practice.

Are there other reasons, including "technical reasons," preventing competition in this case? The Tribunal has already noted that the Department produced little evidence, if any, showing that the Oracle and Sybase systems are not interchangeable within the meaning of Article 1016(2)(b) of NAFTA and Article XV(1)(b) of the AGP. In fact, other than citing the provision of Article 1016(2)(d) of NAFTA in its response to Sybase's objection, the Department admits that no other documentation, including the GartnerGroup document, was used in reaching its decision on the interchangeability issue. The Tribunal notes that the Department's position in this respect is as follows: "[I]n this case, it is considered impractical to consider alternate RDBMS products due to interfacing and interchangeability issues associated with modifying existing systems to suit a different RDBMS." In the opinion of the Tribunal, "impractical" is not sufficient to warrant a derogation from the open competition process. In its intervention, Oracle (echoing the GartnerGroup and other leading computer industry analysts) stresses that significant efforts and costs are normally associated with converting applications from one RDBMS to another. However, in the opinion of the Tribunal, none of these sources affirm that such conversion is impossible. There may be a cost to these conversions which will render a bid by companies such as Sybase unattractive, but this is something the competitive bidding process can deal with.

For its part, Sybase stated that it is not its purpose nor its intent that DND convert its current RDBMS to Sybase products. Sybase is only interested in having a fair chance to compete for DND's RDBMS requirements for new applications, new and replacement services, new projects and project upgrades, etc. Sybase asserts that DND does not need to use Oracle 7 database software and development tools to meet its database requirement, including those presently being met by Oracle products. Sybase supports its assertion by citing market data which indicate that numerous firms secure RDBMS software from more than one supplier. In addition, such software products, due to industry standardization, do work with each other. According to Sybase, though DND may justifiably wish to employ the Oracle 2000 development tool licenses that it has already paid for, this desire cannot dictate a policy of sole-sourcing all RDBMS applications to Oracle where Sybase provides development tools such as "PowerBuilder" that can work well with Oracle, Sybase and other core RDBMS programs. In fact, Sybase asserts that DND already has PowerBuilder tools which permit it to develop RDBMS applications to be used with Oracle 7 and, for example, Sybase System 11 without prior authorization or licensing by Oracle.

Other reasons have been put forward by Sybase to demonstrate how other service providers, such as itself, might be able to meet the future requirements of DND without interfering with the existing Oracle arrangements. These included representations to the effect that: (1) Sybase has available middleware products, such as OmniCONNECT, capable of performing Structure Query Language ("SQL") code conversions in a transparent manner; (2) Oracle, likewise, is a middleware supplier which also contributes to the openness of RDBMS systems and environments; (3) Oracle 2000 series development tools and Sybase PowerBuilder application development tools directly interact with other manufacturers' development tools and RDBMS software, thus avoiding proprietary SQL coding nuances; (4) the rewrite of database applications developed on Oracle tools is possible where the application is specified by the purchaser in functional

terms; and (5) both the current Sybase and Oracle core database programs (Sybase System 11 and Oracle 7) are largely compliant to the same current American National Standards Institute RDBMS standard.

In light of the above, the Tribunal is not satisfied that the Department has demonstrated a case for limited tendering under the provisions of Article 1016(2)(b) of NAFTA and XV(1)(b) of the AGP. The Tribunal will not decide whether or not, in the circumstances, Sybase products and licenses are a reasonable alternative or substitute for Oracle products. This is a decision to be made by the Department and DND. Having determined that Article 1016(2)(d) of NAFTA and XV(1)(d) of the AGP were not properly invoked by the Department in reaching its decision to resort to limited tendering procedures, it is not necessary to consider the provisions in Article 1016(1) of NAFTA and Article XV(1) of the AGP.

Sybase expressed a concern that DND and the Department might resort to using the existing Oracle NMSO for RDBMS products and maintenance services as a fallback position to fulfil DND RDBMS requirements. This eventuality concerns Sybase because the draft agreement between DND and Oracle for the proposed DND RDBMS departmental license and ancillary maintenance services is in the form of a call-up with explicit references to the current Oracle NMSO for software licenses, support services, training, installation and documentation. Sybase states that its concerns arise because this approach has been used extensively in the past by DND. Sybase is also concerned because the continuation of the NMSO, as a basis for sole-sourcing an indefinite number of individual Oracle user licenses, "in and of itself" is contrary to Article 1016(1) of NAFTA.

In this respect, the Tribunal notes, that standing offer procurement is a proper procurement practice resulting in legitimate procurements under NAFTA and the AGP. However, as with any other procurement practice or instruments, standing offers are open to abuse. It is not the Tribunal's intention to make a general declaration that the entire Oracle NMSO is contrary to NAFTA. If a party feels aggrieved because of a government institution's use of standing offers, it can seek the appropriate remedy at that time.

Determination of the Tribunal

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was not conducted in accordance with NAFTA, the AGP and the AIT and that, therefore, the complaint is valid.

Pursuant to subsection 30.15(2) of the CITT Act, the Tribunal recommends, as a remedy, that the Department issue this procurement in accordance with the provisions of the applicable agreements.

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

Notes

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

2 For the purpose of this determination, the expressions "sole-sourcing" and "limited tendering" are used interchangeably.

3 "A database that is organized and accessed according to relationships between data items. A relational database consists of tables, rows and columns. In its simplest conception, a relational database is actually a collection of data files that 'relate' to each other through at least one common field. For example, one's employee number can be the common thread through several data

files — payroll, telephone directory, etc. One's employee number might thus be a good way of relating all the files together in one gigantic data base management system (DBMS)." *Newton's Telecom Dictionary*, 9th ed. (New York: Flatiron Publishing, 1995) at 948.

[4] 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).

[5] A notice of intent to solicit a bid and negotiate with only one firm. This is not a competitive bid solicitation notice. Suppliers, however, on or before the closing date indicated, may identify their interest and demonstrate their capability to perform the contract.

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

[7] As signed at Ottawa, Ontario, on July 18, 1994.

[8] As signed in Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

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

[10] An offer from a potential offerer which allows the Crown to purchase frequently ordered commercially and non-commercially available goods and/or services directly from suppliers at pre-arranged prices, under set terms and conditions, when and if these are requested. A NMSO is a particular type of Standing Offer for the use of a number of specific users throughout Canada.

[11] DND purchased its first Oracle RDBMS software in the early 1980s. It acquired approximately 35 percent of its existing Oracle installations between 1980 and 1985. Over the last 17 years, DND has acquired over $30 million of Oracle software for approximately 30,000 end users through competitive and limited tendering procedures.

In the earlier days of RDBMS, licenses were procured by CPU or machine specific licenses. Such machine specific licenses were limited to a certain number of users. As networks became more popular, suppliers began adjusting their licenses to the operating system ("OS") rather than simply by machine. A big disadvantage of using OS licenses is that they were usually restricted by the number and type of servers allowed and required a payment for each individual server. As a result, a transfer charge was applied every time a government department had to transfer licenses to a different type of server or OS. These transfer fees have cost the Crown millions of dollars over the last few years.

Approximately seven years ago, Oracle began selling named user licenses and concurrent user licenses. A disadvantage of a named user license is the requirement to identify users by name and to report to the contractor changes to the user base whenever they occur. Concurrent user licenses are more advantageous because it allows a predetermined number of concurrent users who do not have to be identified. However, restrictions to the total number of users on a network may apply. For example, the normal ratio of concurrent to named users allowed by Oracle in normal purchases from National Master Standing Offer is 2.5/1. However, in a departmental network server type of license, the agreed-to ratio (with Oracle) is 4/1.

In the case of an RDBMS, a full development license permits to fully develop and/or run any applications, including new applications.

A run time/development license allows users to run applications developed under the more expensive full development license, but users may not develop new applications.

Over the past two to three years, the Department has explored a different way of acquiring RDBMS and other types of software by moving into licenses called "departmental licenses," "enterprise licenses," "enterprise license agreements" or "network server option". This approach allows for a greater, sometimes unlimited, number of servers, the suppression of transfer fees or the need to notify the contractor of changes as long as the concurrent/named user ratio is maintained. It creates a more flexible approach. Finally, when an application is developed under the departmental license and where that department already has a license to run applications, a department can simply delay its runtime users, without having to buy additional database seats (users).

[12] "[T]o ensure compatibility with existing ... licences, copyrights and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative."

[13] The predecessor adjudicator body to receive, inquire into and decide bid challenges under the *Canada-United States Free Trade Agreement.*

[14] Board File No. E90PRF6601-021-0020, January 28, 1991, at 17.