

IN THE MATTER OF THE
AGREEMENT ON INTERNAL TRADE

and

IN THE MATTER OF A REQUEST UNDER SUCH AGREEMENT

made by

HEWITT RAND CORPORATION

to commence dispute resolution proceedings vis-à-vis

SASKATCHEWAN

Screener:
 Jack Gerow

Date of Decision:
 January 15, 1998

This is an intervention under the ***Agreement on Internal Trade*** (the "Agreement"). Such Agreement is between Canada, the Provinces and the Territories. They executed it on July 18, 1994. The objective of the agreement is “to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market”. Furthermore, the parties to the Agreement recognized and agreed that “enhancing trade and mobility within Canada would contribute to the attainment of this goal”.

The parties in this intervention are Hewitt Rand Corporation and Saskatchewan.

The Hewitt Rand Corporation, on December 16, 1997, initiated under Chapter 17 (Part B) of the Agreement a Person-to-Government Dispute Resolution intervention. Hewitt Rand alleges that Saskatchewan violated Articles 403, 404, and 504 of the Agreement in its Request for Proposals (RFP) Reference #101697-3 for computers by limiting bidding to those manufacturers and/or suppliers which qualify for evaluation under the Gartner Group's Tier 1 or Tier 2 for desktop computers and the Gartner Group's Tier 1, Tier 2 or Tier 3 for laptop computers and notebooks.

In response to such application, the Ministry of Employment of Investment of British Columbia, on December 23, 1997, appointed me to act as Screener and established the process to be used by me for the review of the Hewitt Rand

Corporation's request. Such appointment included terms of reference as provided under Article 1713 (2) of the Agreement. This Article empowers each party to the Agreement to establish the process to be used by its screener in this intervention. Among other terms established by British Columbia, both the Hewitt Rand Corporation and Saskatchewan were invited to make submissions to the screener and, if such submissions were made, Hewitt Rand and Saskatchewan were required to provide a copy of such submission to the other side.

Hewitt Rand Submission:

In summary, Hewitt Rand submits that “Article 504, Section 3 (g) of the Agreement has been contravened”. It deals with “the unjustifiable exclusion of a supplier from tendering”. In addition, Hewitt Rand submits that Articles 403 and 404 have been contravened. Those Articles deal with the prohibition of obstacles and legitimate objectives that will permit obstacles.

Saskatchewan Submission:

In summary, Saskatchewan submits that the use of the Gartner Group tiering method of assessment to qualify vendors is proper within the meaning of the Agreement. That a specific vendor, such as Hewitt Rand, does not qualify for an evaluation by the Gartner Group is not evidence that the use of such a standard is in violation of the Agreement and discriminates vendors on the basis of the vendor’s geographic location.

Decision:

Hewitt Rand maintains that Article 403, 404 and 504: 3. (g) have been contravened. Article 504: 3. (g) deals with the exclusion of suppliers from bidding on contracts. On the basis of the submissions before me, I find that the use of the Gartner Group's assessment method not an **"unjustifiable exclusion"** within the meaning of the Agreement. I reach this conclusion by my reading of Article 506:8. of the Agreement. It provides as follows:

"An entity may limit a contract award to goods, services or suppliers that have been assessed (for example, certified, evaluated, qualified, registered or verified) by an independent nationally-recognized and industry supported organization such as the Standards Council of Canada".

I am satisfied that the Gartner Group is ***"an independent nationally-recognized and industry supported organization"***. Its tiering assessment method is recognized and used in a number of jurisdictions. Such method does not assess vendors on the basis of geography. Whether British Columbia uses the Gartner Group's assessment method is not material in this intervention. British Columbia has the right under the Agreement to limit a contract award on the Gartner Group's assessment method or any other method that meets the test of Article 506:8. and other relevant provisions of the Agreement. That Saskatchewan and British Columbia use different methods of assessment is not sufficient cause to find a violation of the Agreement. Both Saskatchewan vendors and British

Columbia vendors face an equal test, the Gartner Group's assessment method, when bidding in Saskatchewan for contracts contemplated here. When bidding in British Columbia, the test is different for all vendors. Different tests, in and of themselves, do not mean that one test is proper and the other is not. It may be argued by some that it is in the general interest to have some standards for qualification that are universal and proper. Such argument is not within the jurisdiction to this intervention.

With respect to Articles 403 and 404, Hewitt Rand submits that Saskatchewan has not provided a "defense" on an alleged contravention of Article 403 and 404.

Article 403 of the Agreement provides that:

Subject to Article 404, each party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.

Saskatchewan submits that the RFP in this case is not inconsistent with Article 403 and therefore Article 404 would not be invoked to justify the maintenance of the use of a standard. Given my reading of Article 506: 8. and the submissions before me, I find that the RFP in this intervention is not inconsistent with Article 403.

In conclusion, the Hewitt Rand request to be permitted to commence dispute resolution proceedings is denied. I find that the complaint is vexatious in that such complaint is without reasonable cause under the ***Agreement on Internal Trade***.

"Jack Gerow"

**Jack Gerow
Screener**

Dated at Vancouver this 15th day of December 1998.