



Ottawa, Friday, March 23, 2001

**File No.: PR-2000-070**

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

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

### **DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Canadian Museum of Civilization Corporation cancel the solicitation and re-issue it in accordance with the provisions of the applicable trade agreements.

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

James A. Ogilvy  
James A. Ogilvy  
Presiding 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: March 23, 2001  
Date of Reasons: April 12, 2001

Tribunal Member: James A. Ogilvy, Presiding Member

Investigation Officer: Paule Couët

Counsel for the Tribunal: Michèle Hurteau

Complainant: Lexmark Canada Inc.

Government Institution: Canadian Museum of Civilization Corporation

Counsel for the Government Institution: David Sherriff-Scott



Ottawa, Thursday, April 12, 2001

**File No.: PR-2000-070**

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

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

### STATEMENT OF REASONS

On March 2, 2001, Lexmark Canada Inc. (Lexmark) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning Solicitation No. CMCC-126 by the Canadian Museum of Civilization Corporation (CMCC) for the supply of Hewlett-Packard printers and accessories.

Lexmark alleged that the reasons given by the CMCC for requiring a specific brand of printer are not in accordance with the intent and principles of the *Agreement on Internal Trade*.<sup>2</sup> Specifically, Lexmark alleged that the reasons invoked by the CMCC are contrary to Article 504(3) of the AIT and do not meet the intent of Article 506(12)(a).

Lexmark requested, as a remedy, that the Tribunal postpone the award of any contract in relation to this solicitation and that a new invitation to tender (ITT) with a fair and open specification be issued. In the alternative, Lexmark requested to be compensated for the opportunity that it lost. Lexmark also requested its costs for filing this complaint.

On March 7, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup> That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until it determined the validity of the complaint. On March 12, 2001, the CMCC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On March 21, 2001, Lexmark filed comments on the GIR with the Tribunal.

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.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
  2. 18 July 1994, C. Gaz. 1995.I.1323, on-line: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
  3. S.O.R./93-602 [hereinafter Regulations].
  4. S.O.R./91-499.

## **PROCUREMENT PROCESS**

### **Background**

On February 15, 2001, the CMCC issued an ITT for the purchase of 20 computer printers by posting the ITT on Canada's Electronic Tendering Service (MERX). The ITT set out the specifications for the printers at Appendix "C" which reads, in part: "All new printers Hewlett Packard, model HP4050TN".

On February 22 and 23, 2001, the CMCC issued two addenda to the ITT. The second addendum addressed two questions raised by bidders, whereas the first one reads, in part, as follows:

#### **HEWLETT PACKARD PRINTER PURCHASE 2001**

The bidders are invited to provide price proposals on HP4050TN printers as described in the original Invitation to Tender and on the new HP4100TN printers with the following specifications:

- 20 HP 4100TN with 32 MB SDRAM memory card
- 20 C8055A additional paper tray (500 sheets)
- 20 3 years on-site extended warranty (parts and labor)

On February 27, 2001, Lexmark wrote the CMCC, pointing out that it offered printers which were equivalent to the Hewlett Packard printers to be procured and asking for an opportunity to tender its products.

On February 28, 2001, the CMCC responded, in writing, that: "[it] believes that our requirement for compatibility with existing printers from both a management and support issue is of sufficient concern and importance to warrant a brand specific requirement". Lexmark filed this complaint with the Tribunal on March 2, 2001.

## **POSITION OF PARTIES**

### **CMCC's Position**

The CMCC submitted that, in good faith, it articulated its need for the same brand of printers as those already supporting its network for the following reasons: the Hewlett-Packard 4050TN printers were compatible with its existing information technology infrastructure; the purchase of the same products would reduce desktop support issues; and the CMCC believed that it was entitled to take this approach pursuant to Article 506(12)(a) of the AIT, which allows the identification of specific goods "to ensure compatibility with existing products . . . or to maintain specialized products that must be maintained by the manufacturer or its representative".

The CMCC submitted that it still believed, in this case, that the procurement of Hewlett-Packard printers represented the best solution in terms of financial viability and efficiency. However, the CMCC indicated that it understood that the ITT may have been constructed in a fashion that inadvertently contravened Article 504(3) of the AIT. The CMCC further indicated that it is prepared to immediately re-issue the ITT, indicating that it wished to procure Hewlett-Packard printers or their technological equivalent.

Given the position that it was taking, the CMCC submitted that no order of costs should be made. In the alternative, the CMCC reserved its right to comment on such cost award.

## Lexmark's Position

Lexmark submitted that the issue of the printers' compatibility with other printers raised by the CMCC in the GIR is irrelevant, since printers on a network do not interface with each other. Furthermore, Lexmark submitted that the printers that it provides are also compatible with the CMCC's "existing information technology infrastructure".

Lexmark submitted that the fact that Addendum 1 to the ITT invited bidders to provide price proposals on both the HP4050TN printers and the new HP4100TN printers clearly demonstrates that the CMCC was not "standardizing the main network printers on the 4050TN platform", as submitted by the CMCC in the GIR. In fact, Lexmark submitted, the CMCC was prepared to introduce into its network a different, yet unreleased, product, the HP4100TN printer.

Lexmark submitted that its printers are fully compatible with Hewlett-Packard drivers that allow Lexmark printers to integrate seamlessly into a multiple vendor environment. Furthermore, Lexmark submitted that printers are not specialized products and, as such, are not required to be maintained by the manufacturer or its representative. In fact, Lexmark argued, many brands of printers are maintained by third-party maintenance companies which, in some cases, maintain several brands of printers.

Lexmark disagreed with the CMCC's assertion that, in the circumstances, Hewlett-Packard printers represent the best solution in terms of financial viability, efficiency and rationale. Lexmark submitted that a fair and open competition in accordance with the requirements of the AIT is the best way to accomplish this objective.

## TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration 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 applicable trade agreements.

Article 501 of the AIT provides that, consistent with the principles set out in Article 101(3), the purpose of Chapter Five is, in part, to establish a framework that will ensure equal access to procurements for all Canadian suppliers. Article 101(3) further provides, *inter alia*, that parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada. Against this backdrop, Article 504(3)(b) prohibits the biasing of technical specifications in favour of, or against, particular goods or the suppliers of such goods for the purpose of avoiding the obligations of Chapter Five. Article 506(12)(a) provides that, where only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 of Article 506 to ensure compatibility with existing products, to recognize exclusive rights or to maintain specialized products that must be maintained by the manufacturer or its representative.

In its submission, the CMCC indicated that, in invoking the provisions of Article 506(12)(a) of the AIT, it may have constructed the ITT in a fashion that inadvertently contravened Article 504(3).

Addressing, first, the application of Article 506(12)(a) of the AIT to the circumstances of the case, the Tribunal observes that a precondition to the application of this article is that "only one supplier is able to

meet the requirements of a procurement”. In this instance, the Tribunal finds that the CMCC has not established the existence of that precondition before the Tribunal. In fact, there exist many vendors that can offer the Hewlett-Packard printers requested by the CMCC and, therefore, the Tribunal determines that Article 506(12)(a) does not apply in this instance.

Because Article 506(12)(a) of the AIT does not apply to the situation, consequently, the CMCC was not at liberty to vary the procedures prescribed in Articles 506(1) through (10). Accordingly, the Tribunal has considered whether the provisions of Article 504(3) have been properly applied in conducting this procurement. The Tribunal finds that, by specifying Hewlett-Packard printers on a no-substitute basis, the CMCC biased the technical specifications in favour of a particular product. In the Tribunal’s opinion, contrary to the provisions of the AIT, this had the effect of creating a barrier to trade and prevented equal access to this procurement by all Canadian suppliers.

With respect to limiting this procurement to a single manufacturer’s product, the CMCC has effectively prequalified that product and limited the procurement to only those suppliers offering that product. The CMCC has done so in a manner that is contrary to the requirements of Article 506(7)<sup>5</sup> of the AIT.

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

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the provisions of the AIT and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the CMCC cancel the solicitation and re-issue it in accordance with the provisions of the applicable trade agreements.

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

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

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5. “An entity may limit tenders to goods, services or suppliers qualified prior to the close of call for tenders. However, the qualification process must itself be consistent with Article 504. An invitation to qualify shall be published at least annually by a method referred to in paragraph 2(a) or (b) or shall be distributed to suppliers listed on a source list referred to in paragraph 2(c)”.