



Ottawa, Monday, July 30, 2001

File No. PR-2000-078

IN THE MATTER OF a complaint filed by Eurodata Support Services 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 Eurodata Support Services Inc.'s complaint with respect to the manner in which the Department of Public Works and Government Services and the Department of Human Resources Development structured the requirement for the provision of preventive and remedial hardware maintenance and software support services for some 120 Hewlett-Packard server systems and their associated peripherals owned by the Department of Human Resources Development, is not valid.

As a result, the Canadian International Trade Tribunal further determines that Eurodata Support Services Inc. is not a potential supplier on the designated contract. Therefore, the Canadian International Trade Tribunal will not rule on whether the Department of Public Works and Government Services and the Department of Human Resources Development contravened the provisions of the trade agreements by awarding the designated contract to Hewlett-Packard (Canada) Ltd. using limited tendering procedures.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: July 30, 2001

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Michèle Hurteau

Complainant: Eurodata Support Services Inc.

Intervener: Hewlett-Packard (Canada) Ltd.

Counsel for the Intervener: Adam F. Fanaki
Davit D. Akman
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Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
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STATEMENT OF REASONS

COMPLAINT

On April 11, 2001, Eurodata Support Services Inc. (Eurodata) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning an Advance Contract Award Notice (ACAN) (Solicitation No. V9330-000085/A) by the Department of Public Works and Government Services (the Department) for the provision, on a sole source basis, by Hewlett-Packard (Canada) Ltd. (Hewlett-Packard) of on-site preventive and remedial hardware maintenance, installation and reconfiguration and software support services, including on-site firmware² updates, for approximately 120 Hewlett-Packard server systems owned by the Department of Human Resources Development (HRDC).

Eurodata alleged that, in conducting this procurement, HRDC and the Department contravened the principles of the *North American Free Trade Agreement*,³ the *Agreement on Internal Trade*⁴ and the *Agreement on Government Procurement*⁵ by awarding the contract to Hewlett-Packard, thereby bypassing the tendering process and eliminating an opportunity for fair competition to firms like Eurodata. Eurodata further submitted that, contrary to the Government's position, the requirements for hardware maintenance and software support services should be separated so as to allow fair competition and to create a public perception of fairness in the marketplace.

Eurodata requested, as a remedy, that the contract with Hewlett-Packard be terminated and that the Tribunal, instead, order the Department to exercise the option to renew its contract with Eurodata for fiscal year April 1, 2001, to March 31, 2002. In the alternative, Eurodata requested that the Department be ordered to enter into a new contract with Eurodata for the period ending March 31, 2002, with an option for the Department to renew the contract for a further one-year period. In the further alternative, Eurodata requested

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. Firmware is an integral part of computer devices. Specifically, firmware is the heart or the internal code that governs the operation of a device and that determines the output, processing and capability of components. The firmware is proprietary to the original equipment manufacturer (OEM).
 3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
 5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].

to be compensated for the profits that it lost for the period from April 1, 2001, to March 31, 2002. Finally, Eurodata requested its costs in this matter.

On April 18, 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*.⁶ That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On April 20, 2001, the Department informed the Tribunal, in writing, that a contract in the amount of \$1,329,864.59 had been awarded to Hewlett-Packard on March 29, 2001. Accordingly, on April 23, 2001, the Tribunal issued an order rescinding its postponement of award order of April 18, 2001. On May 1, 2001, the Tribunal informed the parties that Hewlett-Packard had been granted intervener status in the matter. On May 30, 2001, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁷ On June 12, 2001, Hewlett-Packard filed comments on the GIR with the Tribunal and, on June 26, 2001, Eurodata filed its comments in response.

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

Background

To better understand the matter at issue, it is useful to provide some information on how Eurodata's June 30, 2000, contract for hardware maintenance services came about and why HRDC decided not to exercise the option clause therein.

On March 20, 2000, the Department received a requisition from HRDC for the provision of hardware maintenance, software support and installation and reconfiguration services on 70 Hewlett-Packard servers in the National Capital Region. On March 31, 2000, the Department issued a competitive solicitation for this requirement to all potential suppliers. As a result of questions received from potential suppliers during the bidding period, the solicitation was amended to exclude the software support services portion of the requirement. On June 30, 2000, a contract for hardware support services was awarded to Eurodata, the lowest-priced compliant bidder. The contract was for the period from July 1, 2000, to March 31, 2001, and included an option for an extension to the contract period for two additional one-year periods. The option was exercisable by HRDC.

During the contract period, more specifically, on July 20 and 21, 2000, HRDC, as part of a normal server rebuild process, informed Eurodata that a technician might be required, should it become necessary to update the firmware in order to support additional drives. On these occasions, it became evident to HRDC that Eurodata could not perform on-site firmware upgrades. In any event, Eurodata asserted that firmware upgrades were not covered by the contract for hardware maintenance services.

At a meeting held on July 27, 2000, HRDC advised the Department that it had expected firmware upgrades to be performed under the hardware maintenance services contract with Eurodata and that the

6. S.O.R./93-602 [hereinafter Regulations].

7. S.O.R./91-499.

requirement for firmware updates constituted a significant part of HRDC's hardware maintenance needs. Following the meeting, the Department examined the contract and the solicitation documents and could not find any requirement referring specifically to firmware. Although it was subsequently confirmed that firmware upgrades are performed routinely under hardware maintenance services contracts and further established that firmware upgrades are generally viewed in the industry as hardware maintenance services, HRDC nevertheless determined that "firmware upgrades" were not specifically mentioned in other similar contracts.

By letter dated September 26, 2000, HRDC notified the Department of its difficulties in obtaining firmware upgrades separately from the preventive and remedial hardware maintenance services provided by Eurodata. As an interim measure, the Department negotiated with Hewlett-Packard and issued a contract amendment to its existing contract with the firm for software support services to specifically cover the firmware/hardware preventive and remedial maintenance services that Eurodata was not authorized to perform under its June 30, 2000, contract.

Procurement Process

On January 15, 2001, the Department received a requisition from HRDC for the requirement contained in Solicitation No. V9330-000085/A. The requisition was accompanied by a rationale supporting the use of limited tendering procedures in accordance with several articles of the applicable trade agreements on the basis that Hewlett-Packard has exclusive rights to provide proprietary firmware and microcode updates on its servers.

In mid-February 2001, HRDC was contacted by Eurodata to inquire whether HRDC would exercise the option on its contract. HRDC advised Eurodata that it would not exercise its option, as it required on-site firmware upgrades to be performed as part of the maintenance requirement, and that Eurodata was unable to provide this service.

On February 27, 2001, an ACAN for this solicitation was posted on Canada's Electronic Tendering Service (MERX). The requirement was set out in the ACAN, in part, as follows:

Human Resources Development Canada requires a Contractor to provide on-site preventive and remedial hardware maintenance services, installation and reconfiguration services and software support services for Hewlett Packard proprietary software, including on-site firmware (micro code) updates for its approximately one hundred and twenty (120) Crown-owned Hewlett Packard Series HP 9000 D, E and K server systems and their associated peripherals.

On March 15, 2001, Eurodata challenged the ACAN. On March 28, 2001, the Department rejected Eurodata's challenge, in part, as follows:

- Eurodata is not capable of fulfilling the total requirement, but proposes as an alternative that the requirement be split between itself and the OEM;
- the proposed splitting of the requirement is insupportable from both an operational and security perspective;
- the OEM has advised that Eurodata has not been certified to provide the complete range of services specified in the ACAN;
- given the highly integrated nature of the system to be maintained, it would be inappropriate to contract with any firm that was not authorized or certified by the OEM to provide the complete range of services required.

POSITION OF PARTIES

Department's Position

Citing Article 1016(2)(b) of NAFTA, Article XV(1)(b) of the AGP and Article 506(12)(a) of the AIT, the Department submitted that the limited tendering procedure was conducted in accordance with the trade agreements. Referring to File No. PR-098-039,⁸ the Department submitted that it established the circumstances that it invoked to derogate from normal tendering procedures.

Specifically, the Department submitted that it awarded the contract to Hewlett-Packard because the firm holds the exclusive rights to provide the necessary microprogramming upgrades to firmware. The Department added that the server systems include Hewlett-Packard proprietary software, such as Hewlett-Packard OpenView software, which monitors and manages the functioning of the Hewlett-Packard server hardware, and that Hewlett-Packard must provide the required ongoing software service patches, updates and engineering changes on this proprietary software, which is inextricably linked to the operation of the hardware. Therefore, the Department submitted that, for reasons connected with the protection of "exclusive rights" held by the OEM with respect to its firmware and proprietary software, it was necessary to use limited tendering procedures in the circumstances.

Furthermore, referring to Article XV(1)(b) of the AGP, the Department submitted that there is no evidence of any intent on its part to avoid competition. The facts demonstrate that it was in response to questions raised by bidders that the Department originally decided to separate the software support services portion of HRDC's requirement from the hardware maintenance services portion, which, according to HRDC, was intended to include on-site firmware updates. However, because of the proprietary rights of Hewlett-Packard, Eurodata was unable to perform the firmware updates. This situation resulted in HRDC's subsequent decision to sole source its requirement to the OEM in order to meet its operational requirements.

Addressing Article 506(12)(a) of the AIT, the Department submitted that the facts of this case establish that the Hewlett-Packard server systems are "specialized products that must be maintained by the manufacturer or its representative". An attempt to compete the requirement and contract with a supplier that is not authorized to provide support services to Hewlett-Packard hardware and proprietary software, including firmware updates, has established that it is necessary to have the specialized server products maintained by an OEM-authorized service provider.

The Department, relying on File No. PR-2000-037,⁹ submitted that the Crown, not a particular supplier or the supplier community, is entitled to determine and define the Crown's requirements in a solicitation. In this context, the Department submitted that Eurodata's position that the Crown's requirements should be split between itself and the OEM is without merit and is made solely to benefit Eurodata to the detriment of HRDC's legitimate operational requirements. The Department argued that, due to the frequent and ad hoc nature of remedial hardware maintenance, as well as the need to restore operations within the minimum possible time frame, it is not practical to expect HRDC to monitor each hardware fix to determine whether a firmware update is also required so that it can advise another supplier. The Department asserted that a comprehensive system management function is the type of service required from an information technology service provider.

8. *Re Complaint Filed by Wescam* (19 April 1999) (CITT).

9. *Re Complaint Filed by Computer Talk Technology* (26 February 2001) (CITT).

The Department further submitted that the primary question at issue has to do with alleged monopolistic and restrictive trade practices of OEMs, which is a matter outside of the procurement process at issue and the Tribunal's jurisdiction. The Department submitted that it is up to Eurodata to pursue its rights of action in the appropriate forum.

The Department submitted that the Tribunal has no jurisdiction to conduct an inquiry with respect to whether the Department ought to have exercised its option in the contract with Eurodata. This question, the Department submitted, is a contract administration issue, which is outside the ambit of the "procurement process" and, therefore, is not subject to review by the Tribunal. Moreover, the Department argued that, as a matter of law, there is no obligation on the Crown to exercise such an option.

The Department submitted that a recommendation by the Tribunal that the Crown terminate the contract with Hewlett-Packard and conduct an open competitive procurement would not benefit Eurodata, which, by its own admission, is not a Hewlett-Packard OEM-authorized service provider and, therefore, could not meet the requirements of the solicitation. Furthermore, given that no suppliers other than Eurodata responded to the ACAN, the Department submitted that it has established that a recommendation that the Crown terminate the contract with Hewlett-Packard and conduct an open competitive procurement would not benefit the supplier community.

Hewlett-Packard's Position

Hewlett-Packard submitted that, overall, it supports the submissions made by the Department in the GIR. In addition, it submitted that firmware is an integral part of computer devices, which is the heart or internal code that governs the operations of a device and that determines the output, processing and compatibility of components. Hewlett-Packard added that, although many OEMs may use the same components in their respective products, these products are differentiated by their installed firmware. Each OEM's firmware provides the OEM with its own competitive advantage, hence, its proprietary nature. Hewlett-Packard submitted that, although simple firmware is available and may be downloaded through the Web, upgrades and performance enhancements on firmware for complex devices and mission-critical systems may require special tools, training and authorization to ensure that these devices function properly.

With respect to the propriety of combining hardware maintenance and software support services, Hewlett-Packard submitted that there is a legitimate technical and economic justification to do so. Specifically, Hewlett-Packard submitted that a single support organization offers a comprehensive understanding of the system, which is more effective in resolving issues that may require both hardware and software solutions. Furthermore, Hewlett-Packard submitted that, contrary to Eurodata's assertions, combined hardware maintenance and software support is cost-effective, less open to risks and more efficient, particularly when time is of the essence.

In addition, Hewlett-Packard submitted that combining the requirements for hardware maintenance and software support services in the same procurement is a legitimate operational requirement that is consistent with the prevailing industry practice, as applied to Hewlett-Packard's competitors, such as IBM Corporation, Sun Microsystems, Inc., Compaq Canada Corp. and Electronic Data Systems Corporation.

Finally, Hewlett-Packard supported the Department's position that the Crown, not a particular supplier or the supplier community, is responsible for determining and defining the Crown's requirements in a solicitation.

Eurodata's Position

Eurodata submitted that, immediately after it was awarded the contract for hardware maintenance services in June 2000, Hewlett-Packard initiated representations to the Department in an attempt to eliminate it and any non-OEM from competing for future contracts.

Addressing the "economics" argument in the GIR, Eurodata submitted that its bid on the contract was some \$150,000 less than that of Hewlett-Packard and that the only evidence of additional cost to the government provided in the GIR in connection with firmware upgrades pales in comparison to that amount. Eurodata further submitted that its performance of the contract was exemplary and that Hewlett-Packard's attempts to disengage it from the contract were the root of any dissatisfaction that HRDC might have had.

Eurodata further submitted that firmware updates on different pieces of Hewlett-Packard equipment are handled in many different ways other than by contract with Hewlett-Packard. It added that the Department's purchases of hardware from Hewlett-Packard would have included installation and that, to make installation of disk drives possible, the appropriate firmware or code would have to be installed by the OEM, normally at no additional expense to the client.

Eurodata submitted that the ACAN mentions Hewlett-Packard or an authorized Hewlett-Packard reseller as being capable of performing the contract. This, Eurodata submitted, widens the field beyond Hewlett-Packard itself. As there existed several such resellers, Eurodata queried why the contract was given to Hewlett-Packard rather than tendered out so that other qualified parties could bid. Eurodata submitted that, by so doing, the Department could have saved money, which is clearly part of its mandate.

Eurodata suggested that the Department appears to be steering all contracts, such as the one at issue, to OEMs even though there is no conclusive evidence of cost savings for so doing. In this context, Eurodata submitted that the Crown's right to determine its requirements must be tempered with an effort to minimize expenditures, eliminate favouritism to specific suppliers and stop the manipulative influence of the OEMs on the end-user requirements.

Eurodata submitted that Hewlett-Packard's reference to it as an "Unauthorized Third Party Maintenance organization" is particularly distressing, since Eurodata applied for Hewlett-Packard authorization on several occasions in the last decade, but, in each case, this authorization has been inexplicably and unreasonably withheld. However, Eurodata remains open to pursuing this relationship with Hewlett-Packard.

Eurodata submitted that, in its experience, the Crown has always carried its hardware maintenance contracts to full term, i.e. exercised its options, except in extenuating circumstances. While Eurodata admitted that HRDC had no legal obligation to exercise the option years, it submitted that the Government's decision not to exercise its option in this instance is uncharacteristic and heavy handed.

In conclusion, Eurodata submitted that the necessity for the OEM to have the hardware maintenance contract is more perceived than real and that the occasional inconvenience that might be spared by a government department having this arrangement is not offset by the Department's obligation to get the best value for its dollar by contracting with efficient and proven third-party suppliers.

TRIBUNAL'S DECISION

Subsection 30.14(1) 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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, comprise NAFTA, the AGP and the AIT.

As a preliminary matter, the Tribunal notes that the question of the appropriateness of HRDC's decision not to exercise its option to continue using Eurodata's services is, in the circumstances, a contract administration issue, which does not fall within the Tribunal's bid protest jurisdiction. Similarly, the issue raised by Eurodata concerning alleged monopolistic and restrictive trade practices on the part of Hewlett-Packard does not fall within the Tribunal's jurisdiction.

Article 1001(4) of NAFTA provides that no party may prepare, design or otherwise structure any procurement contracts in order to avoid the obligations of Chapter Ten of NAFTA. Article 506(6) of the AIT requires that tender documents clearly identify the requirements of the procurement.

The Tribunal must decide whether, in preparing, designing or otherwise structuring this solicitation, HRDC and the Department acted in a manner as to avoid the obligations of the applicable trade agreements.

The Tribunal finds that the Department and HRDC did not breach the provisions of the applicable trade agreements in requesting that potential suppliers interested in this solicitation be able to provide hardware maintenance, including on-site firmware updates, and software support services for the 120 Hewlett-Packard servers owned by HRDC. In the Tribunal's opinion, HRDC's requirement for integrated hardware maintenance and software support services is real and reasonable. Leaving aside the issue of the limited tender, the Tribunal is not persuaded that, in combining hardware maintenance and software support services, HRDC and the Department would prevent other potential suppliers from bidding on this requirement.

Due to the existence of certain proprietary rights held by Hewlett-Packard, Eurodata cannot perform certain on-site firmware updates required by the solicitation. Eurodata does not contest this. However, as indicated by the Department and Hewlett-Packard, this limitation does not extend to authorized Hewlett-Packard resellers. In the Tribunal's view, these resellers could, on their own or in partnership with other companies, such as Eurodata, deliver all the requirements in the solicitation.

HRDC was required to state fully and clearly its requirements in the tender documents. As such, it was entitled to express any real and reasonable needs that it may have had. Furthermore, the Tribunal is of the view that HRDC was under no obligation to compromise its legitimate operational requirements to accommodate Eurodata's particular corporate circumstances.

In light of the above decision and Eurodata's admission that it is not an authorized dealer for Hewlett-Packard products and, as such, cannot provide all the services required in the solicitation, particularly the on-site firmware updates, the Tribunal finds that Eurodata is not a potential supplier on this designated contract. Therefore, in the Tribunal's opinion, Eurodata does not have standing to file grounds of complaint in relation to this procurement. As a consequence, the Tribunal will not consider the merits of Eurodata's allegation that, because there exist several authorized Hewlett-Packard resellers capable of

performing the contract, HRDC and the Department acted improperly in using limited tendering procedures to conduct this procurement.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, determines that Eurodata's complaint with respect to the manner in which the Department and HRDC structured the requirement for the provision of preventive and remedial hardware maintenance and software support services for some 120 Hewlett-Packard server systems and their associated peripherals owned by HRDC, is not valid.

As a result, the Tribunal further determines that Eurodata is not a potential supplier on this designated contract. Therefore, the Tribunal will not rule on whether the Department and HRDC have contravened the provisions of the trade agreements by awarding the designated contract to Hewlett-Packard using limited tendering procedures.

Richard Lafontaine
Richard Lafontaine
Presiding Member