

Ottawa, Thursday, August 30, 2001

File No. PR-2001-006

IN THE MATTER OF a complaint filed by Foundry Networks on behalf of Diversicomm Data Systems Inc., a division of Megatech Electrical Ltd., 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 not valid.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination:	August 30, 2001
Date of Reasons:	October 2, 2001
Tribunal Member:	Ellen Fry, Presiding Member
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Dominique Laporte
Complainant:	Diversicomm Data Systems Inc.
Counsel for the Complainant:	Phil Weedon, Foundry Networks
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

Ottawa, Tuesday, October 2, 2001

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IN THE MATTER OF a complaint filed by Foundry Networks on behalf of Diversicomm Data Systems Inc., a division of Megatech Electrical Ltd., under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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STATEMENT OF REASONS

COMPLAINT

On April 19, 2001, Diversicomm Data Systems Inc. (Diversicomm), a division of Megatech Electrical Ltd., 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 a procurement (Solicitation No. 31184-004343/A) by the Department of Public Works and Government Services (PWGSC) for the provision of BayStack network switches or equivalent and parts for the National Research Council (NRC).

Diversicomm alleged that PWGSC incorrectly found its proposal to be non-compliant with the requirements of the solicitation and that its pricing was significantly lower than the price at which the contract was awarded to the successful bidder. Diversicomm requested as a remedy that the contract awarded to EDS Innovations, Ottawa, Ontario, be cancelled and retendered.

On April 24, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.11(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On May 28, 2001, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On June 6, 2001, Diversicomm filed a request to extend the deadline for submitting its comments on the GIR. The Tribunal extended the deadline to June 18, 2001. On June 18, 2001, Diversicomm again asked for a time extension to allow settlement talks to be held with PWGSC. The deadline was extended to June 29, 2001. On July 9, 2001, Diversicomm filed comments with respect to the GIR.

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.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. S.O.R./93-602 [hereinafter Regulations].
3. S.O.R./91-499.

PROCUREMENT PROCESS

On January 23, 2001, a Notice of Proposed Procurement and a Request for Proposal (RFP) for this procurement were issued by PWGSC. The period for the submission of proposals initially closed on March 8, 2001, but was extended to March 14, 2001.

The following portions of the RFP are relevant to this case.

Article B.3i)f) of the RFP reads as follows:

NRC maintains a complete set of spares for all components comprising the Campus and Enterprise data networks. In order for a Bidder to meet equivalence it must include with its proposal the cost of one spare of each type of chassis, blade Media-Dependant Adapter (MDA) and power supply that are included in any proposal.

Article B.2ii), of the RFP reads, in part:

ii) **Mandatory Requirements for Technical Proposal (M)**

It is **MANDATORY** that the Technical Proposal contain the following:

- (c) Responses to technical requirements must include a narrative which substantiates the response. Where it is necessary to refer to other documentation which is included with the proposal, include the precise location in the reference material including the title of the document, and the page and paragraph numbers.

Annex "A", "Specifications", of the RFP reads, in part:

2.2 The switches communicate with each other using Spanning Tree Groups, a proprietary extension to the IEEE 802.1d protocol.

2.3 The switches must be capable of supporting proprietary LinkSafe redundant physical links which allow for the automatic transfer of traffic from one Gigabit Ethernet Link to another in less than one second on detection of a link failure.

2.4 The switches must be capable of supporting a proprietary Multi-Link Trunking protocol that distributes traffic based on source and destination Ethernet address for bridged traffic and source and destination IP address for routed traffic.

The GIR indicates that seven bids were received. Diversicomm's proposal included two distinct options, Option A and Option B. On March 23, 2001, PWGSC awarded the contract to EDS Innovations.

On March 29, 2001, PWGSC advised Diversicomm, by facsimile, that its proposal was considered to be non-compliant for the following reasons:

- failure to meet Article B.3i)f)
- failure to meet Section 2.2 in Annex "A"
- failure to meet Section 2.3 in Annex "A"
- failure to meet Section 2.4 in Annex "A"

On April 19, 2001, Diversicomm filed this complaint with the Tribunal.

POSITION OF PARTIES

Position of PWGSC

PWGSC submitted that Diversicomm's complaint was submitted late. PWGSC's position is that Diversicomm knew or ought to have known of the grounds of its complaint on or shortly after January 31, 2001, when it ordered the bid package from MERX,⁴ but did not file its complaint with the Tribunal until April 19, 2001.

PWGSC submitted that Diversicomm's proposal had to meet the mandatory requirements of the RFP at the time of bid closing and that the proposal was properly declared non-compliant on several grounds.

PWGSC submitted that Diversicomm's bid failed to include "the cost of one spare for each type of chassis, blade Media-Dependant Adapter and power supply" and that, under the trade agreements, PWGSC could not legitimately modify or supplement Diversicomm's bid by assigning a cost to spares equal to the prices quoted in Diversicomm's proposal. PWGSC also submitted that it was not reasonable to assume that the cost of the replacement is identical to the cost of its replaced part.

With respect to the information required by sections 2.2, 2.3 and 2.4 of Annex "A" of the RFP, PWGSC submitted that Diversicomm failed to include a narrative that fully substantiated that mandatory technical requirements had been met, as per the requirements specified in the RFP.

Position of Diversicomm

With respect to the issue of the alleged failure of Diversicomm's proposal to provide replacement pricing, Diversicomm submitted the following in its response to correspondence from PWGSC:

Our financial proposal outlined unit pricing for all material requested in your RFP. We did provide pricing for spares because the cost of the replacement is identical to the cost of its replaced part. Further, we feel that if there was some confusion on the part of PWGSC, a clarification should have been requested. Nevertheless, our submission did include spare pricing.

With respect to the alleged failure of Diversicomm's proposal to meet the requirements in sections 2.2, 2.3 and 2.4 of Annex "A" of the RFP, Diversicomm submitted:

Based on the information provided in the RFP we are compliant. If NRC wants to prove that we are not compliant then there would have to be a benchmark test where we would bring in our products so that compliance or non-compliance could be proven.

Since we were not invited to prove our compliance the only thing that we can assume is that NRC was indirectly specifying Nortel products only and that they had no [intention] of entertaining equivalent solutions. If this is true then this RFP was drafted in a restrictive and discriminatory fashion, which is against . . . NAFTA and CITT rules.

TRIBUNAL'S DECISION

Subsection 30.14(1) 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 an inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other

4. Canada's Electronic Tendering Service.

requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements of the applicable trade agreements.

The Tribunal first determined that the complaint was submitted in a timely fashion. Diversicomm learned of its grounds of complaint on March 29, 2001, when it received a letter from PWGSC indicating that its proposal was found to be non-compliant. On that same day, Diversicomm sent a letter to PWGSC stating its objection to this decision by PWGSC. On or about April 9, 2001, not having received a response to its March 29, 2001, objection, Diversicomm decided to file a complaint and, accordingly, wrote to the Tribunal. The Tribunal requested additional information and considered the complaint to be filed on April 19, 2001, when it received this information. Both the objection to PWGSC and the subsequent complaint to the Tribunal were filed within the time frame prescribed by subsection 6(2) of the Regulations.

The Tribunal then considered PWGSC's decision to declare Diversicomm's proposal non-compliant.

With respect to pricing for spares, Articles B.2ii) and B.3i)f) of the RFP set a clear requirement that pricing for spares be included in the financial portion of a bidder's proposal. The Tribunal finds that PWGSC was correct in determining that the complainant's proposal did not address this requirement. The proposal did not contain any wording that would reasonably indicate that spares were to have the same cost as the cost of the parts being replaced. Furthermore, the proposal included a document describing a "Spares Program Discount", which indicated that discounts were available for spares, but that "[t]he Discount level depends on the Minimum Support Coverage for all systems owned by the customer". This document did not indicate what level of discount would apply to this particular contract proposal.

Since the pricing of spares was a substantive and mandatory requirement of the RFP, PWGSC did not have the discretion to seek this information. Adding pricing for spares to the complainant's proposal would have amounted to the substantive modification of the proposal.

Accordingly, the Tribunal finds that PWGSC was correct in determining that Diversicomm's proposal did not comply with a mandatory requirement of the RFP and hence that PWGSC was also correct in considering Diversicomm ineligible to be awarded the contract at issue. This determination makes it unnecessary to consider the issues raised concerning compliance with the requirements of sections 2.2, 2.3 and 2.4 of Annex "A" of the RFP.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the complaint is not valid.

Ellen Fry
Ellen Fry
Presiding Member