



Ottawa, Thursday, June 21, 2001

File No. PR-2000-065

IN THE MATTER OF a complaint filed by Cifelli Systems Corporation 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 subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Cifelli Systems Corporation its reasonable costs incurred in preparing a response to this solicitation.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Cifelli Systems Corporation 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

Date of Determination and Reasons: June 21, 2001

Tribunal Member: James A. Ogilvy, presiding member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Eric Wildhaber

Complainant: Cifelli Systems Corporation

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
Susan D. Clarke
Ian Mcleod



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STATEMENT OF REASONS

COMPLAINT

On February 21, 2001, Cifelli Systems Corporation (Cifelli) 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 the procurement (Solicitation No. W8485-00AL22/A) by the Department of Public Works and Government Services (the Department) for the provision of five notebook computers for the Department of National Defence (DND).

Cifelli alleged that the Department improperly evaluated its proposal as being non-compliant and inappropriately cancelled this tender. Cifelli further alleged that the Department unduly pressed it to answer questions that it had already addressed and to withdraw its bid.

Cifelli requested, as a remedy, compensatory damages and an additional amount to compensate it for the opportunity that it lost to be the successful bidder. In the alternative, should the government be able to prove to the Tribunal that it intended to write “simultaneous DVD and CD-RW” into the specifications, Cifelli requested compensatory damages and an additional amount for lost opportunity. In the further alternative, Cifelli indicated that it would be prepared to settle the matter for a stated amount without review and to free up the Crown to purchase a solution from another supplier.

On February 22, 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*.² 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 March 20, 2001, the Department filed abbreviated submissions in lieu of the Government Institution Report (GIR) required pursuant to subrule 103(1) of the *Canadian International Trade Tribunal Rules*.³ On April 12, 2001, Cifelli filed its response 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.

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 December 11, 2000, a Notice of Proposed Procurement (NPP) and a Request for Proposal (RFP) for this procurement were posted on Canada's Electronic Tendering System (MERX).

The RFP, as amended, included the following provisions.

Article 4.0 of Part I of the RFP indicated that the requirement is subject to the *Agreement on Internal Trade*.⁴

Article 1.2 of Part III of the RFP reads as follows: “**Some** requirements of this RFP are identified as ‘MANDATORY’ or (M). If a mandatory requirement is not complied with, the Proposal will be considered non-compliant and will not receive further consideration. Furthermore, the words ‘shall’, ‘must’, and ‘will’, herein are to be interpreted as ‘MANDATORY’.”

Appendix A to the RFP, “Statement of Requirement,” reads, in part, as follows:

Media/Modular Bays - Minimum quantity two (2).

To be embedded in the NoteBook, empty, and accessible from the outer perimeter of the notebook. Will be used to interchange the DVD, CD, and Floppy or hard drives. At a minimum the Hard Disk plus any combination of 2 of the DVD, CD-RW + Floppy Disk Drives must be available concurrently when installed in the system.

Note To Bidders: The users of these Notebooks will be providing on-site service to clients that have inadvertently corrupted/compromised databases written in Oracle.

[Emphasis added]

The Department received four proposals, including one from Cifelli, by the bid closing date, on January 22, 2001.

On January 23, 2001, the Department requested that Cifelli clarify its bid price. That same day, Cifelli answered the Department's query in writing. On January 24, 2001, the Department returned the clarification provided by Cifelli on January 23, 2001, as it constituted a “Late Revision”, which the Department could not accept. In a letter addressed to Cifelli on January 29, 2001, the Department explained why the revision that it sent on January 23, 2001, could not be accepted. On January 30, 2001, the Department asked Cifelli, in writing, to clarify certain aspects of its bid and, on February 2, 2001, the Department asked Cifelli for an additional clarification.

On February 6, 2001, Cifelli was advised, in writing, by the Department that the proposal that it had submitted in response to the solicitation at issue was considered technically non-compliant because the system that it proposed did not meet the above-stated requirements in Appendix A. The letter also advised that, “[a]s a result of evaluation,” the solicitation was cancelled. Later that day, the Department confirmed by e-mail that none of the bids submitted met all the mandatory requirements. That same day, Cifelli sent an e-mail message to the Department alleging that its bid met the impugned mandatory requirement and that, therefore, it was objecting to the cancellation of this solicitation.

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

On February 16, 2001, the Department posted an NPP and an RFP on MERX (Solicitation No. W8485-00AL22/B) which resolicited the goods that were the subject of Solicitation No. W8485-00AL22/A.

Appendix A, "Statement of Requirement", to Solicitation No. W8485-00AL22/B reads, in part, as follows:

The Hard Disk plus any two of the DVD CD-ROM, CD-RW, and Floppy disk drives must be concurrently (which means all at the same time) housed internally in the notebook and be operational. Each of the following three drive combinations below must be supported:

1. DVD CD-ROM drive and CD-RW drive and hard disk
2. DVD CD-ROM drive and Floppy disk drive and hard disk
3. CD-RW drive and Floppy disk drive and hard disk

The vendor's proposal must clearly demonstrate where and how each of these three required combinations of drives is accommodated internally within the notebook.

When the DVD CD-ROM and CD-RW Drives are installed in the notebook a user must be able to copy a CD from the DVD CD-ROM drive to the CD-RW drive.

Cifelli downloaded the solicitation document for this resolicitation from MERX on February 19, 2001. On February 21, 2001, Cifelli filed its complaint with the Tribunal and, on February 22, 2001, the Tribunal informed the Department of that fact.

POSITION OF PARTIES

Department's Position

The Department submitted that the notebooks purchased in this solicitation were intended for use in field maintenance applications that service and maintain large-scale military aircraft-related databases at remote locations across Canada and overseas. This work involves copying media and hard drives, as well as recovering data files and applications. In order to perform the required applications, the Department submitted that DND required and continues to require notebooks which are capable of operating any of the drives listed in Appendix A to the RFP when they are installed in the system. The Department added that the requirement for notebooks that are capable of simultaneously operating internally installed drives, such as the DVD CD-ROM and CD-RW drives, significantly exceeded the functionality of the microcomputers available on the National Master Standing Offer (NMSO) for notebook computers. The Department submitted that this requirement caused DND to invest significant time and resources to initiate an RFP procurement process for a relatively small acquisition (five notebooks) rather than initiating a call-up against an NMSO for more standard equipment.

The Department disputed Cifelli's statements ascribed to the various officials of the Department and DND, and stated that any comments made concerning the withdrawal of Cifelli's bid were made in the context of the appropriate procedures to be followed in the event that the bidder had made an error in its pricing proposal and sought to amend its pricing following the closing date for the submission of bids.

The Department further submitted that, notwithstanding the interpretation of the technical requirements advanced by Cifelli, the following facts are clear, straightforward and unassailable:

- The system proposed by Cifelli does not have the capability to have the DVD CD-ROM and CD-RW drives installed internally and available concurrently in the notebook.

- DND's requirement is for the DVD CD-ROM and CD-RW drives to be installed internally and available concurrently in order to allow the end user to copy a CD from the DVD CD-ROM drive to the CD-RW drive.
- The Department acted promptly in re-issuing the RFP on February 16, 2001, which contained a fuller description of the technical requirements, in a *bona fide* effort to preclude any further misunderstanding of the technical specifications.

Referring to previous determinations of the Tribunal,⁵ the Department submitted that, where a problem with the interpretation of a technical requirement or the evaluation criteria becomes apparent only after bid closing, the correct approach is to cancel and retender the requirement. In this instance, the Department submitted that it was unaware that the technical requirements were being interpreted differently by Cifelli until the evaluation stage of the procurement process.

Furthermore, the Department submitted that the ability to decide what technical specifications are necessary based on operational needs and performance requirements is a prerogative of DND and the Department. Accordingly, the Department argued, accepting Cifelli's interpretation of the technical requirements and prohibiting the Department and DND from proceeding with the retendered solicitation would effectively preclude DND from obtaining notebooks that satisfy its legitimate and reasonable technical requirements.

In conclusion, the Department argued that it was entirely necessary and appropriate that it proceed with the retendered procurement process to ensure that all prospective bidders have an opportunity to compete for the provision of notebook computers in accordance with DND's specific operational requirements.

Cifelli's Position

Cifelli submitted that the GIR did not address its charges, but merely extended a list of irrelevant or less-than-truthful submissions in an attempt to sidetrack the Tribunal. Cifelli submitted that the fact that the Department re-issued Solicitation No. W8485-00AL22/A "with revised technical specifications" relating to the matter in question is proof that the original solicitation did not contain such requirements.

Cifelli submitted that it is impossible to interpret the impugned specifications of Solicitation No. W8485-00AL22/A as meaning that the Department wanted that the products that it sought to procure include the concurrent availability of the three drive combinations subsequently described in Solicitation No. W8485-00AL22/B. Cifelli argued that the interpretation proposed by the Department is self-serving and is an attempt to suit its needs or desire to cancel and retender in order to allow another company to enter a bid.

Cifelli argued that the Department's submissions in the GIR are largely unsubstantiated, incomplete and irrelevant to this case and, therefore, should be stricken from the GIR. It argued that the Department acted with less than full transparency when it failed to inform all bidders that this solicitation was the subject of a complaint.

Cifelli submitted that its grievance relative to the resolicitation is not technical; rather, the resolicitation should not have been issued because Cifelli should have been awarded a contract for

5. *Re Complaint Filed by Installation Globale Normand Morin & Fils* (21 August 1998), PR-98-002; *Re Complaint Filed by Service Star Building Cleaning* (12 February 1999), PR-98-031.

Solicitation No. W8485-00AL22/A. Furthermore, in Cifelli's words, the resolicitation is "disingenuous," in that the Department is "[g]oing to public tender with [specifications] only one vendor can meet, masquerading or veiling as if the competition were truly open."

Cifelli asserted that all the statements that its complaint ascribes to the various officials of the Department and DND are true. Cifelli submitted that it had no difficulty interpreting the specifications in the solicitation and that, if a difficulty exists with the specifications, it is that of the Department and DND. Cifelli submitted that it had no way of discovering DND's intent in drafting the specifications and, therefore, responded to the specifications as set out in the RFP.

Cifelli submitted that it recognizes that the government can change or alter requisitions or specifications at any time or for any reasons, but not without consequences. Cifelli alleged that it was compliant with the requirements of the solicitation as set out in the RFP and that, therefore, it should be compensated for its bid preparation costs, its lost profits and the cost that it incurred in pursuing this complaint.

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, which, in this case, is limited to the AIT.

Article 506(6) of the AIT provides that tender documents shall clearly identify the requirements of the procurement.

The Tribunal finds that the language used in the section of Appendix A to the RFP that describes the required combination of pairs of DVD, CD and floppy or hard drives to be embedded in the notebook computers is ambiguous and lends itself to more than one reasonable interpretation, that of Cifelli and that of DND. The Tribunal notes that the ambiguity was latent and only came to the attention of the Department and DND after the period for submitting proposals had elapsed. The Tribunal finds that the Department and DND failed to identify clearly in the RFP the requirements of the procurement and that this action constitutes a breach of Article 506(6) of the AIT.

Cifelli submitted that the government can change requisitions or specifications, but not without consequences. In this instance, the Tribunal is of the view that the Department acted diligently upon discovering that the language used in that part of Appendix A to the RFP failed to set out unambiguously all the requirements of the intended procurement. The Tribunal is also of the view that, when this became apparent to the Department, it proceeded expeditiously to correct the situation by cancelling the solicitation and by re-issuing it with a more precise specification. In this connection, the Tribunal also notes that the complaint was fully documented and, therefore, filed on February 21, 2001, not February 16, 2001, as submitted by Cifelli. The Tribunal regards the Department's re-issuance of the RFP on February 16, 2001, as legitimate and as further evidence of the Department's diligence in correcting the shortcoming of the original RFP.

Cifelli alleged that, in re-issuing the solicitation with a more precise specification, the Department improperly cancelled a valid solicitation in response to which it had allegedly received a responsive offer.

Cifelli submitted that this was done in order to favour the product of another supplier. The Tribunal finds that there is no merit to this allegation. Because the Department, in good faith, failed to clearly describe DND's need in the RFP, it received an offer from Cifelli for a product other than the one currently required by DND. In the circumstances, the Tribunal is of the opinion that there is no obligation on the Department or DND to acquire these goods or to compensate Cifelli therefor. Insofar as favouritism is concerned, the Tribunal finds that there is no evidence on the record to support this allegation.

Attempting, to the extent possible, to put Cifelli back into the position in which it was before this solicitation started, the Tribunal will award Cifelli its reasonable costs incurred in filing and proceeding with this complaint. Furthermore, because the ambiguity in the RFP was latent and, therefore, was not discovered by the Department until after bid closing and after Cifelli had incurred costs to submit a response to the solicitation, the Tribunal will also award Cifelli its reasonable costs incurred in preparing a response to this solicitation.

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 subsection 30.15(4) of the CITT Act, the Tribunal awards Cifelli its reasonable costs incurred in preparing a response to this solicitation.

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

James A. Ogilvy
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Presiding Member