



Ottawa, Monday, June 4, 2001

File No. PR-2000-067

IN THE MATTER OF a complaint filed by Foundry Networks 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.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: June 4, 2001

Tribunal Member: Peter F. Thalheimer

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: John Dodsworth

Complainant: Foundry Networks

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



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IN THE MATTER OF a complaint filed by Foundry Networks 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

COMPLAINT

On March 7, 2001, Foundry Networks (Foundry) 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 Solicitation No. W3078-01NABT/A, by the Department of Public Works and Government Services (the Department), for the supply of Ethernet switching equipment for the Department of National Defence (DND) – Canadian Forces Base (CFB) Halifax, Nova Scotia.

Foundry alleged that, even though Cabletron or equal products have been specified, the specifications of the Request for Proposal (RFP) are still restrictive because they are identical to the specifications of older Cabletron products and contain features that are specific to Cabletron products only. This, Foundry alleged, is contrary to the provisions of Article 1016(2)(b) of the *North American Free Trade Agreement*² and Article 506(12)(b) of the *Agreement on Internal Trade*.³

Foundry requested, as a remedy, that the Department reissue this RFP with enough information and latitude to allow it to submit a competitive proposal. In the alternative, Foundry requested financial relief equal to the value of any resulting contract.

On March 15, 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*.⁴ 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 16, 2001, the Department informed the Tribunal that, on February 14, 2001, a contract for the subject goods in the amount of \$45,913 had been awarded to Custom Fit Inc. and that the goods had been delivered. Accordingly, on March 19, 2001, the Tribunal issued an order rescinding its postponement order of March 15, 2001. On April 10, 2001, the

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].

Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On April 30, 2001, Foundry filed 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 PROCESS

On January 23, 2001, a Notice of Proposed Procurement (NPP) was published on Canada's Electronic Tendering Service (MERX). The NPP identifies the procurement as falling under goods and services identification number (GSIN) N5805 corresponding to Federal Supply Classification (FSC) Code 5805, a category of goods exempt from NAFTA by virtue of Article 1001 and Annex 1001.1b-1 and from the *Agreement on Government Procurement*⁶ under Article I(1) and Annex 1 to the Canadian Appendix. The NPP indicates that the solicitation is covered by the AIT.

Part I of the RFP describes the goods as follows:

- 1 Supply and Delivery of: Six (6) Ethernet Workgroup/Desktop Fibre Switches, Specification in accordance with Annex "A" attached. An acceptable switch has been identified as Enterasys Networks model 2E42-27R.
- 2 Supply and Delivery of: Six (6) FE-100FX Fast Ethernet Port Interface Modules (One Per Switch as described in Item 1) which provides a full duplex SC Interface for Multimode Fibre. Specification in accordance with Annex "A" attached.
- 3 Supply and Delivery of: One (1) 16 Switched Port 100Base-FX Port Fast Ethernet Workgroup Switch In Accordance With Annex "A" attached. An acceptable switch has been identified as the Enterasys Networks model 2H25B-17R.

Section 1 A. of the RFP, Instruction to Bidders/Contractors, provides that inquiries regarding the bid solicitation must be submitted as early as possible within the bidding period and no less than seven calendar days prior to bid closing to allow sufficient time to provide a response. Inquiries received less than seven calendar days prior to bid closing might not be answered prior to bid closing.

Under the heading "Criteria & Method of Evaluation", the RFP reads in part as follows:

- (a) Compliance with the Technical Description at Annex "A"
 - Bidders must provide written documentation/brochures, which address each item of the specification to enable the proposed product to be technically assessed. Failure to provide such information may render your bid technically non-responsive for failure to satisfy the Technical end-users that the product offered meets or exceeds the specification requirements.

Annex "A" to the RFP sets out a number of mandatory specifications and deliverables for each of the items.

On January 29, 2001, Foundry downloaded the bid package from MERX. On February 6, 2001, the day the solicitation closed, the Department received correspondence from Foundry dated February 5, 2001, raising a number of questions and objecting to the directing of the RFP indirectly to a specific manufacturer.

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

6. April 15, 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

On February 6, 2001, the Department advised Foundry that the bid closing date for this RFP would remain unchanged. In addition, the Department stated:

You and any potential supplier are more than welcome to submit a proposal. As you are aware, equipment can be proposed on an “or equal” basis. It is the responsibility of the bidder to provide documentation in accordance with the solicitation that can be technically assessed to show that the proposed product meets or exceeds the specification.

I will pass your questions to our client, however as you’ve waited to the closing day, there is no guarantee of a response prior to bid closing.

On February 12, 2001, the Department confirmed to Foundry that, the terms of the RFP having been reviewed, it concluded that the solicitation was not restricted to a particular manufacturer and that any alternative equipment proposed that met or exceeded the RFP specifications would have been considered. On February 19, 2001, Foundry informed the Department by facsimile that, if the RFP was not reissued, it would file a complaint with the Tribunal. That same day, Foundry sent its complaint to the Tribunal.

POSITION OF PARTIES

Department’s Position

The Department submitted that, if Foundry legitimately and in good faith wanted to submit a bid in response to the RFP, it would not have waited over one week after receiving the solicitation documents, on the morning of the bid closing day, to seek further information. Similarly, the Department submitted, Foundry would not have objected to a solicitation until after it had directed inquiries in writing to the contracting authority, as required by the RFP, and had received an unsatisfactory response.

The Department added that, in this instance, Foundry did not submit a bid or any evidence that it was capable of fulfilling the requirements of the procurement. The Department argued that Foundry had no intention of submitting a bid and had not established that it was capable of fulfilling this requirement. Accordingly, the Department submitted that Foundry is not a potential supplier (i.e. actual or prospective bidder) and that the Tribunal therefore lacks jurisdiction to consider this complaint.

In the alternative, the Department submitted that there was an onus on Foundry to seek clarification of the solicitation documents. By denying the Department a fair opportunity to respond to its request for information prior to bid closing, Foundry cannot argue that it was denied an opportunity to submit a bid in response to the RFP. The Department cited the Tribunal’s determinations in file Nos. PR-99-006⁷ and PR-2000-010⁸ in support of this point.

The Department submitted that, with respect to the Federal Government, Article 504(2) of the AIT is limited to prohibiting discrimination based on province or region. Furthermore, the Department argued that Article 504(3) merely illustrates measures that are inconsistent with Article 504(2). In this context, the Department submitted that soliciting for equipment that meets or exceeds certain technical specifications, by itself, is geographically neutral and is therefore not objectionable under Article 504.

In the alternative, the Department argued that the RFP did not use “restrictive technical specifications” as alleged by Foundry.

7. *Re Complaint Filed by Quality Services International* (28 June 1999), (CITT).

8. *Re Complaint Filed by Thomson-CSF Systems Canada* (12 October 2000), (CITT).

Citing the Tribunal's determinations in file Nos. PR-98-012, PR-98-014⁹ and PR-2000-037,¹⁰ the Department submitted that it has the right to procure equipment having specifications known to meet or exceed its client's particular needs. In addition, the Department submitted that the RFP clearly allowed for the submission of equivalent products and that Foundry was aware of that possibility before bid closing.

The Department, citing file No. PR-2000-037 in support, submitted that the technical specifications listed at Annex "A" to the RFP were those of the equipment in use at CFB Halifax and that there was no better way of describing DND's requirements for interoperability and performance than using the specifications of the equipment presently being used and known to meet its requirement. Referring to File No. PR-97-045,¹¹ the Department added that, if it is acceptable under the trade agreements to solicit for a named product or equivalent, then, *a fortiori*, it is acceptable to solicit for equipment that meets or exceeds certain specifications. This, the Department argued, holds true regardless of whether or not those specifications refer to particular equipment.

Moreover, the Department submitted that the RFP solicited equipment that meets or exceeds certain technical specifications for valid operational reasons, namely DND's requirements for interoperability and performance. The object or intention of procuring equipment that meets or exceeds certain specifications was not "for the purpose of avoiding the obligations" of Chapter Five of the AIT. Accordingly, the Department argued that the solicitation did not breach the provisions of Article 504(3)(b) of the AIT.

Finally, the Department submitted that Article 506(12)(b) of the AIT is not relevant in this instance. This provision allows a government institution to use limited tendering procedures under certain circumstances. This RFP, the Department pointed out, used open tendering procedures.

Foundry's Position

In its comments of April 30, 2001, Foundry indicated that the statement of facts in the GIR is not entirely correct. It submitted that, on many occasions during this procurement, it indicated to the Department over the telephone that the RFP specified Cabletron products indirectly. In addition, Foundry submitted that it had placed several voice mail messages with the Department, which were never returned.

Foundry disputed the Department's argument that it had no intention to bid for this procurement. It indicated that it would have bid the FastIron product line, which would have met DND's requirements, but not the restrictive specifications in the RFP, which mentioned Cabletron items.

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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

The Tribunal notes that the goods in issue belong to FSC Code 5805, a class of goods that is excluded from the application of NAFTA by virtue of Annex 1001.2b(1)(c). Therefore, this procurement

9. *Re Complaint Filed by Corel Corporation* (26 October 1998), (CITT).

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

11. *Re Complaint Filed by Flolite Industries* (8 May 1998), (CITT).

does not fall within the Tribunal's jurisdiction under NAFTA. However, the AIT applies to this solicitation and the Tribunal will consider the merits of the complaint in this context.

With respect to the Department's argument that Foundry did not intend to bid nor did it submit a bid on this solicitation and, therefore, is not a potential supplier within the meaning of section 30.1 of the CITT Act (i.e. a bidder or prospective bidder on a designated contract), the Tribunal determines that Foundry is a potential supplier and has standing to bring this complaint to the Tribunal. In the Tribunal's opinion, it is clear from the evidence on the record that Foundry wished to participate in this solicitation. To that end, Foundry made several representations, orally and in writing, to the Department and DND with a view to modifying the specifications and extending the time limit to submit a proposal. The fact that Foundry was unsuccessful in these representations and ultimately did not submit a proposal does not change anything to the fundamental reality that Foundry was a prospective bidder for this solicitation. Furthermore, the Tribunal is satisfied that Foundry's capability to participate in a solicitation for equipment such as the one required in the RFP is not in issue. In the Tribunal's view, this is particularly evident since the RFP was open to any products that met or exceeded certain stated mandatory requirements.

Article 501 of the AIT provides that one of the purposes of Chapter Five is to establish a framework that will ensure equal access to procurement to all Canadian suppliers. Against this backdrop, Article 504(3)(b) prohibits the biasing of technical specifications in favour of, or against, particular goods and services and their suppliers for the purpose of avoiding the obligations of the Chapter. Article 504(3)(g) further prohibits the unjustifiable exclusion of a supplier from tendering.

The Department argued that, with respect to the Federal Government, Article 504(2) of the AIT is limited to prohibiting discrimination based on province or region and that, in this context, Articles 504(3)(b) and (g) merely illustrate measures that are inconsistent with Article 504(2). Therefore, the Department submitted, soliciting for equipment that meets or exceeds certain technical specifications, by itself, is geographically neutral and, for this reason, not objectionable under Article 504(2).

The Tribunal finds that Foundry's allegation that the specifications used in the RFP are restrictive and favour certain named products is without merit. In the Tribunal's opinion, the RFP clearly indicates that the Department will consider and accept any product that "meets or exceeds the specifications requirements." It was therefore open to Foundry to propose any product that met or exceeded the specifications set out in the RFP. The fact that the specifications were to some extent written around certain Cabletron products does not make these specifications necessarily objectionable under the AIT. The Department was not insisting on obtaining a given product on a no-substitute basis. Rather, in the Tribunal's opinion, the Department indicated in the RFP that it would consider any product that met or exceeded the specifications. This view is supported by the description in the RFP of the goods wherein the Department identified, as an example, by name and model number switches that it found acceptable.

Foundry is concerned that, because the specifications are modelled in part on Cabletron products, certain detailed features of the specifications are unique to Cabletron products and, therefore, the specifications are restrictive and favour Cabletron products. The Tribunal understands Foundry's concern. However, in the Tribunal's opinion, given the structure of the RFP and the evaluation methodology set out therein, the detailed features set out in the specifications, even though these are mandatory evaluation criteria, constitute only elements of an equivalency test. In the Tribunal's view, the Department clearly recognized this fact in the GIR when it stated that the reference to the equipment in use at CFB Halifax was a way of stating DND's interoperability requirements, not a way of specifying a product on a no-substitute basis. Furthermore, although Foundry asserted in its submission that no other product can meet or exceed the specifications, the Tribunal is of the view that there is no evidence on the record to support this assertion.

In fact, Foundry indicated in its submission that it could propose products that met or exceeded the fundamental requirements of the specifications.

With respect to Foundry's allegation that this procurement is in breach of Article 506(12)(b) of the AIT, the Tribunal finds that this allegation has no merit. These provisions concern circumstances where only one supplier is capable of meeting the requirements of the procurement. In this instance, the Department did not invoke these provisions, and the solicitation was open to any potential supplier proposing any product that met or exceeded the specifications.

DETERMINATION OF THE TRIBUNAL

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

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member