



**IN THE MATTER OF:**

**Complaints  
By 99M Corporation  
of 35 Riviera Drive, Suite 16  
Markham, Ontario**

**Board File Nos:  
E91PRF6633-021-0011 and  
E91PRF6633-021-0012**

**Complaints dismissed**

**AND IN THE MATTER OF:**

**The Free Trade Agreement  
Implementation Act, Part II, Sec. 15  
S.C. 1988, Ch. 65.**

**24 May 1991**

**DETERMINATION BY THE BOARD**

These two complaints are filed by 99M Corporation of Markham, Ontario in respect of two government contracts that were awarded by the Department of Supply and Services (DSS) on a sole source basis to Dialogic Corporation of Parsippany, New Jersey, U.S.A.

Both contracts were apparently for the same product (called four channel voice input/output expansion boards in one contract and Dialogic input/output voice expansion boards in the other) and they were being purchased for use by Revenue Canada (Taxation).

The first of these contracts was awarded on 30 March 1990, and the second on 3 January 1991. The complainant learned of these contract awards through Contract Award Notices published in Government Business Opportunities.

(Under the provisions of the GATT Code which is applicable to Free Trade Agreement contracts, Contract Award Notices (CANs) must be published, even in the case of sole source contracts, within 60 days after contract award. In both these cases, the CANs were not published in time, and the first was published almost 10 months late, on 25 March 1991. The

Board has had occasion to comment upon the late publication of these CANs in an earlier case (LANsPLUS, Board File No. D89PRF6608-021-0006), but it is not in respect of this defect in these two cases that the outcome of these cases falls to be decided.)

The complainant has, by letter of 29 April 1991 to the Board, clarified the basis of its complaint. They note that:

*"...It is not our intention to challenge the right of Supply and Services Canada to purchase hardware directly from Dialogics Corporation. We do however have concerns about the way in which these boards may be utilized by a government department both as a systems developer and end user."*

Their letter goes on to state:

*"...Dialogics Corporation supplies its products to end users, value added resellers and original equipment manufacturers and does not permit its customers to resell them unless they contain a value added component."*

This position is confirmed by DSS in their Governmental Institution Report (GIR) filed in the first of these two cases. They report advice from Dialogic Corporation that:

*"...Dialogic distributes its products in Canada through VARs (Value Added resellers) who provide systems integration to end-customers."*

They go on to state that:

*"Although 99M Corporation is a "VAR", Dialogic advised it would not sell its boards to 99M Corporation or any other company for re-sale to Revenue Canada, as this department is its own system integrator...In addition, Dialogic advised it would not support or provide warranty on any product bought for re-sale purposes only."*

In its GIR on the second of these two cases, DSS has provided a copy of a letter they received from the Ottawa office of Dialogic Corporation dated 18 April 1991, which confirms Dialogic's customary trade arrangements for the sale of these boards in Canada. It states that:

*"...Dialogic does not have any direct re-sellers of its boards level products in Canada."*

As a result of these considerations, the Board concludes that, in fact, DSS could not have procured these voice expansion boards from 99M Corporation owing to the trade arrangement under which Dialogic will not permit these boards to be resold directly to anyone, unless they are incorporated by a "value added reseller" into some other product.

99M Corporation, therefore, by reason of that unwritten trade arrangement (to which they are themselves an accepting party, and to the consequences of which they do not object), is not in fact a potential supplier of these boards, within the definition of that expression as used in the Free Trade Agreement Implementation Act (Section 15) and the PRB Regulations (subsection 2(2)). Under Section 15 of the Act, only a potential supplier may file a complaint, and it is provided in subsection 2(2) of the Regulations that:

*"2(2) "potential supplier" means an actual or prospective bidder whose direct economic interest has been or would be affected by the award of a contract or the failure to award a contract;"*

99M Corporation's real complaint is that the government is acting as their own systems developer in the use to which they put these boards, thereby depriving "...the private sector of an important publicly funded business opportunity...[thereby contradicting]...the often declared priority of Supply and Services Canada regarding the encouragement and support for Canadian small business and high technology." However, their trade arrangement with Dialogic Corporation eliminates them from being "an actual or prospective bidder" and they are not therefore a "potential supplier" of these goods.

DSS, in filing the GIRs for these complaints, offered a justification for having sole-sourced these two procurements. The Board points out that, because this decision is based on the complainant's lack of standing to bring these complaints, it did not deal with the sole source issue.

Accordingly:

**DETERMINATION**

**The Board hereby dismisses both of these complaints because it finds that the complainant is not a potential supplier of the goods purchased under the two contracts in respect of which these complaints were filed.**

**G.A. Berger** \_\_\_\_\_  
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**Chairman**  
**Procurement Review Board of Canada**