

Ottawa, Monday, June 3, 1996

File No.: PR-95-033

IN THE MATTER OF a complaint filed by Emcon Emanation Control Limited under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

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 section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Arthur B. Trudeau

Arthur B. Trudeau

Member

Michel P. Granger

Michel P. Granger

Secretary

**File No.: PR-95-033**

Date of Determination:	June 3, 1996
Tribunal Member:	Arthur B. Trudeau
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	David M. Attwater
Complainant:	Emcon Emanation Control Limited
Counsel for the complainant:	J. Robert Allan
Government Institution:	Department of Public Works and Government Services

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### **FINDINGS OF THE TRIBUNAL**

#### **Introduction**

On March 5, 1996, Emcon Emanation Control Limited (the complainant) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) (Solicitation No. 11QE.08324-5-3136) for the supply of TEMPEST<sup>2</sup> Level I personal computers for the Department of Foreign Affairs and International Trade (DFAIT). The requirement included an initial contract for 131 units and provided for the subsequent purchase, on an as required basis, through a standing offer for up to 131 additional units, plus fibre-optic network interface cards, internal CD-ROMs and spare parts.

The complainant submits that it was the lowest compliant bidder under the Request for Proposal (RFP). It alleges that its proposal was improperly evaluated by the Department and the DFAIT and that the flaws with the testing procedures used by the DFAIT to evaluate the equipment that it supplied for testing are so serious as to invalidate the results and conclusions of the DFAIT evaluation team. The complainant requested, as a remedy, that the Department re-evaluate its bid, including the re-testing of the equipment supplied for testing, and this in the presence of its personnel or independent personnel. Should the re-evaluation and re-testing prove that the complainant's proposal is compliant, it requests that the contract be withdrawn from ISOTEC Corporation (ISOTEC) and be awarded to it. Upon learning that the goods under the contract awarded to ISOTEC had been delivered, the complainant amended the relief that it sought to include the damages that it suffered and such other relief as the Canadian International Trade Tribunal (the Tribunal) may deem appropriate.

#### **Inquiry**

On March 7, 1996, the Tribunal determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>3</sup> (the Regulations) had been

1. R.S.C. 1985, c. 47 (4th Supp.).
2. Depicts a classified technology that reduces the emanations given off by electric equipment and, thereby, reduces the risk of electronic espionage.
3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the *Agreement on Internal Trade*<sup>4</sup> (the AIT) and Chapter Ten of the *North American Free Trade Agreement*<sup>5</sup> (NAFTA).

On April 9, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>6</sup> The complainant filed its comments on the GIR on April 23, 1996.

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 file.

### **Procurement Process**

On December 8, 1995, the 52 members of the Canadian Industrial TEMPEST Program (CITP) were asked whether they would be interested in receiving the solicitation covering 131 TEMPEST workstations and ancillaries for the DFAIT to be issued on or before December 15, 1995. On December 14, 1995, after close of business, an RFP with a bid closing date of January 10, 1996, was issued to the 9 CITP companies which had indicated an interest in this solicitation.

The RFP included, *inter alia*, the following:

#### **A. PROPOSAL REQUIREMENTS**

6. *All sections and paragraphs of the attached "Procurement Specification" shall be addressed in the RFP response with a brief statement indicating what is being proposed and how the proposed product will meet or exceed the specified performance and specification requirements. Technical detail shall be provided that will enable the technical compliance of the bidder's offering to be confirmed.*

#### **B. EVALUATION CRITERIA**

1. *Equipment shall comply with the TEMPEST Level I standard as specified in CID/09/15 and be listed in the latest issue of the NATO Recommended Product List (NRPL) or already be certified to meet the TEMPEST Level I standard by a Certified TEMPEST Professional Level II (CTP II) in a Notice of Equipment Certification. [The DFAIT] staff will evaluate Bidders' proposals for technical merit by the assessment of compliance and adequacy of responses to all aspects of the Procurement Specification.*

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4. As signed at Ottawa, Ontario, on July 18, 1994.

5. Done at Ottawa, Ontario, December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

6. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912, as amended.

3. *To be considered responsive, a bid must meet all of the mandatory requirements of this solicitation. Bids not meeting all of the mandatory requirements will be given no further consideration.*
4. *While it is anticipated that a contract will be awarded to the responsive bidder offering a technically and operationally compliant product at the lowest total price/cost, determined as shown in Section 7.6 of the attached Annex "A", and is able to meet the 31 March 1996 delivery based upon a contract award by 01 February 1996, the Crown ...*

The procurement specification (Doc. No.: SIGN.DESG.20.400.E, Version 1.0, December 4, 1995) states, in part :

- 2.2 *The platform<sup>[7]</sup> must be certified to be Microsoft Windows NT<sup>[8]</sup> 3.5.1 compatible, and individual components not included as part of the platform certification must also be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements. Bidders are **cautioned** that the compatibility must include, and is not limited to the motherboard, video adapter, network interface cards, hard drive adapter, hard disk drive, floppy drive, CD-ROM drives, monitor, keyboard and mouse. The system must function correctly with Windows NT 3.5.1.*

## 7. EVALUATION

- 7.1 *Prior to the award of the contract DFAIT requires that 1 platform be delivered to their headquarters at 125 Sussex Dr. within 5 days after the bid closing date. The platforms will be tested to confirm compliance with their specifications. A requirement tracability matrix shall accompany the platform indicating how each requirement is met.*

*Minimal tests will include the proper operation of:*

*d. Microsoft Windows NT [3.5.1] Workstation software.*

- 7.3 *As well, as part of the proof of compliance, DFAIT will review the TEMPEST Critical Features list, perform a visual inspection of the TEMPEST features and assess the maintainability and robustness of the PC within the DFAIT environment.*

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7. Refers to all components, devices and peripherals required to meet this procurement specification, including but not limited to the system unit, keyboard, monitor, mouse, floppy and hard disk drives, disk controllers, video adapters, network interface cards, memory, PCMCIA cards, cable, power bars and power supply unit.

8. Operating system.

*7.5 The contract will be awarded to the supplier who has the lowest cost, provides certification that the product meets or exceeds the requirement, and passes DFAIT's testing.*

Seven proposals, including one from the complainant, were received by the Department before bid closing on January 15, 1996. On January 16, 1996, the seven proposals were sent by the Department to the DFAIT for technical evaluation. On January 23, 1996, the Department sent a facsimile to the complainant indicating that, after carrying out a preliminary review of its proposal, the DFAIT required additional information for clarification purposes. More specifically, the DFAIT was seeking, *inter alia*, additional information concerning Microsoft Windows NT 3.5.1 hardware compatibility and compatibility tests and certification. It highlighted the need that OEM (original equipment manufacturer) certification be made according to Microsoft's NT certification requirements. It also highlighted the need for the complainant to ensure that OEMs provide evidence that they have a formal agreement to certify products that are NT compatible. The complainant responded to the above request for additional information on January 25, 1996, as follows: (1) the complainant, itself, certified that the proposed EMCON 520 TEMPEST Pentium computer is Microsoft Windows NT 3.5.1 compatible; and (2) the Department's request for clarification concerning the requirement that OEM certification be in accordance with Microsoft's NT certification requirements constitutes a change from the original specification in the RFP. Nevertheless, the complainant described the actions that it had initiated to accommodate this change, namely, (1) obtaining a copy of the System Compatibility Test (SCT, sometimes referred to as the Hardware Compatibility Test [HCT] kit for Windows NT 3.5.1 from Microsoft); (2) initiation of a pre-test of the EMCON 520 TEMPEST Pentium computer as specified in Microsoft's step-by-step instructions; and (3) assembly of the "test package" as described in Microsoft's instructions and submission of the said package to Microsoft. The complainant states that, upon submission of the test package, it will "enter into formal agreement with Microsoft to certify [that] the EMCON TEMPEST Pentium Computers are Windows NT 3.5.1 compatible." The complainant then states that, upon completion of the above actions, "the EMCON systems will be listed on the Hardware Compatibility List."

Given that, at the request of some suppliers, the bid closing date was extended by five days to accommodate certain suppliers that were delayed in the preparation of their offers by a severe snow storm which affected the east coast of the United States on January 7 and 8, 1996, and considering a contract had to be issued in early February 1996 to allow for delivery of the initial contract by the end of March 1996, the DFAIT agreed to double up on the evaluation process and commenced the testing of the proposed workstations while the proposal evaluation was proceeding.

A bid evaluation report dated January 30, 1996, was produced by the DFAIT. The report recommended that ISOTEC, the only acceptable vendor in this instance, be awarded the contract. In respect of the complainant's offer, the report indicates that its proposal is non-compliant on six counts, as follows: section 2.1, notice of equipment certification, specifically the CD-ROM; section 2.2, Microsoft's NT compatibility certification; section 3.13, keyboard; section 3.15.c, video image; section 3.17, ISA slots; and section 3.18, mouse.

A contract dated February 5, 1996, was issued to ISOTEC by the Department and, on the same date, the complainant was informed that it was unsuccessful in its bid.

In order to facilitate the consideration of this complaint, a number of key facts concerning another solicitation, hereinafter referred to as the Upgrade Kit Contract, are set out below. The competitive solicitation concerning the upgrade of workstations for the DFAIT was won by the complainant, and a contract was issued for this solicitation on September 12, 1995. On January 11, 1996, the complainant delivered three prototypes of the upgrade kit to the DFAIT for functional software testing. On February 20, 1996, the complainant met with the DFAIT to discuss the upgrade kit testing results and the equipment failures found. On February 27, 1996, the complainant visited the DFAIT headquarters to witness a demonstration of the equipment failures found. On March 6, 1996, the complainant submitted to the DFAIT a final "Detailed Plan of Attack" to be implemented by the complainant to rectify the problems. On March 29, 1996, the DFAIT advised the complainant that the upgrade kit design had been accepted and instructed the complainant to proceed with production delivery.

On March 5, 1996, the complainant filed this complaint with the Tribunal.

## **Validity of the Complaint**

### Complainant's Position

In its comments on the GIR, the complainant submits that section 2.2 of the procurement specification means that the platform must be certified to be compatible and that all components not on the platform must be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements. It further submits that, as no criteria were specified for the certification of the platform, certification by any qualified person satisfied the requirements. In this context, the complainant indicates that it certified the platform and that, in its certification, it relied on OEM compatibility assurances and its own testing procedures. It submits that it is qualified to deliver such certification due to its extensive expertise and in-house testing facilities and the fact that it is a qualified TEMPEST certifier.

Alternatively, the complainant submits that the RFP means that the platform must be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or, if the platform is not listed, that all the components must be listed or be OEM certified to that effect. In this context, the complainant indicates that, in its response of January 25, 1996, to the Department, it set forth a listing of all components contained in the platform that it proposed, stating that the components either were listed on Microsoft's Windows NT compatibility list or had OEM certification. Moreover, it indicated that the motherboard was OEM certified as complying with Microsoft Windows NT and that no OEM certification could be obtained for floppy drives. Finally, the complainant indicated that the motherboards that it offered in its proposal were from Amptron International Inc., the same supplier as the one used in the Upgrade Kit Contract. The Department has indicated that it is satisfied that the motherboards proposed for the Upgrade Kit Contract satisfy the requirements of Microsoft Windows NT 3.5.1. The motherboards received the same OEM certification under the two solicitations.

The complainant further submits, as a third alternative, that section 2.2 of the procurement specification means that, if the platform must be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list, none of the platforms submitted, including that of the winning bidder, ISOTEC, complies. It states in support of this proposition that no provision exists for the testing of floppy drives or motherboards

by themselves. These devices must be tested as part of a system. The complainant further emphasizes that each system requires a separate test run to be listed on the hardware compatibility list. A motherboard extracted from a certified system does not have Microsoft Windows NT compatibility certification nor does the assembly of certified components result in a certified system. The complainant also submits that the winning bidder has not obtained compatibility certification, as there is no listing of ISOTEC or any of its products on the product lists for October 1995 and March 1996. In addition, though the Department has indicated in the GIR that the system submitted by ISOTEC, specifically the motherboard, meets Microsoft's NT certification requirements because it is based on a product (i.e. Digital Equipment Corp. Venturis 575) listed on the hardware compatibility list, the complainant believes that the system submitted by ISOTEC contains certain hardware not contained in the Venturis 575, including the CD-ROM, network interface card and SCSI adapter. The complainant concludes on this point by stating that its proposal was subjected to tests at a higher level than the proposal of the winning bidder, that it has provided evidence to the Department, by the hardware compatibility list or by OEM letters, that its system is compliant and that similar evidence has been supplied and accepted by the Department and the DFAIT for the Upgrade Kit Contract.

On the issue of the testing of the proposed equipment, the complainant, in addition to challenging and rebutting a number of statements made and facts relied upon by the Department in the GIR, submits that the testing conducted in respect of the Upgrade Kit Contract is relevant to the matter. Specifically, it states that: (1) it has not been provided with the opportunity to review the testing performed by the Department despite its request to that effect; (2) certain problems experienced during the testing of the system, e.g. Microsoft Windows NT hang up and video resolution, were also identified as problems in the Upgrade Kit Contract and were caused by faulty or non-standard equipment used by the Department in the testing; (4) the testing carried out by the complainant established Microsoft Windows NT 3.5.1 compliance; and (5) the testing procedures/knowledge of fault testing by the Department is faulty and inadequate. The complainant argues that its proposal did not receive a fair test because the Department had pre-determined the results.

#### Department's Position

In its response to the complaint, the Department submits that the complainant incorrectly claims that its TEMPEST Pentium workstation is compliant and incorrectly concludes that the testing performed by the DFAIT was flawed. The Department contends that the TEMPEST Pentium workstation proposed by the complainant was determined to be non-compliant, firstly, because the complainant failed to substantiate its certification claim of Microsoft Windows NT 3.5.1 compatibility and, secondly, because problems were encountered during the in-house testing.

On the question of the certification, the Department submits that, though the complainant certified the proposed TEMPEST Pentium workstation to be Microsoft Windows NT 3.5.1 compatible, it failed to comply with "paragraph 6. of Article A. **PROPOSAL REQUIREMENTS**" in the RFP requiring technical detail to be provided to enable the technical compliance of the offering to be confirmed. The complainant's clarifications of January 25, 1996, did not provide the necessary detail to confirm the certification claim.

On the question of the in-house testing, the DFAIT's testing found that the complainant's proposed TEMPEST Pentium workstation would crash and not function correctly when running Microsoft Windows NT 3.5.1 and that the video image was blurry. The Department submits, however, that the results of the



testing could be considered inconsequential because the complainant's proposal was found not to meet the mandatory RFP requirement to substantiate the certification that the proposed TEMPEST Pentium workstation is Microsoft Windows NT 3.5.1 compatible. In addition, the Department submits that the complainant has based its conclusion that faulty tests were conducted by the DFAIT upon a perception of circumstances extrapolated from a contract for a different requirement, the Upgrade Kit Contract, which is not the subject of this complaint. The Department categorically denies that the testing procedures were flawed and contends that it is inappropriate for the complainant to draw such conclusions from the Upgrade Kit Contract, which involved Delta Data and Datawatch 386 TEMPEST workstations. Different test parameters applied and a different DFAIT team was involved. The Department also submits that, while the test results are inconsequential since the complainant's proposal failed to meet all the mandatory requirements of the RFP, the results of the testing by the DFAIT nevertheless indicate that the TEMPEST Pentium workstation proposed by the complainant did not meet the DFAIT's functional requirements. In summary, the Department states that the complainant was correctly denied the contract and is entitled to no relief.

#### Tribunal's Decision

Section 30.14 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 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 requirements set out in the AIT and NAFTA.

Article 506(6) of the AIT provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

Article 1015(4)(a) of NAFTA provides that, "to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation."

The Tribunal, having examined the evidence and arguments presented by both parties and considering the obligations specified in the AIT and NAFTA, has concluded that the complaint is not valid.

The complainant argues that its offer was compliant with the procurement specification as stated in the RFP, specifically section 2.2 dealing with Microsoft's NT certification requirements. It submits that the Department was not at liberty to change the original specification in the RFP, after bid closing and during bid clarification, and to insist that OEM certification be made in accordance with Microsoft's NT certification requirements. In the complainant's view, section 2.2 did not require that the platform be certified in accordance with Microsoft's NT certification requirements, and to introduce this requirement after bid closing is unfair to bidders. Insofar as product testing is concerned, the complainant alleges that the testing procedures used by the DFAIT to evaluate the product that it proposed is so seriously flawed as to invalidate any evaluation conclusions resulting therefrom.

The Tribunal concludes that the requirement of section 2.2 of the procurement specification is mandatory, as is the requirement to pass the DFAIT's testing (section 7.5) and the requirement of paragraph 6 of the proposal requirements to provide technical detail necessary to confirm the technical compliance of bidders' offerings. These requirements are essential requirements within the meaning of Article 1015(4)(a) of NAFTA and, consequently, the complainant's offer had, *inter alia*, to conform to these three requirements at the time of bid opening to be considered for award. This is not in dispute.

There remain, however, three points to be considered by the Tribunal, namely: (1) the meaning of section 2.2 of the procurement specification and whether the Department changed this mandatory requirement after bid closing; (2) whether the requirements for Microsoft's NT certification and the DFAIT testing requirements were clearly identified in the tender documents; and (3) whether the Department and the DFAIT properly applied these evaluation criteria in evaluating the complainant's offer.

Section 2.2 of the procurement specification reads as follows:

*The platform must be certified to be Microsoft Windows NT 3.5.1 compatible, and individual components not included as part of the platform certification must also [emphasis added] be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements. Bidders are cautioned that the compatibility must include, and is not limited to the motherboard, video adapter, network interface cards, hard drive adapter, hard disk drive, floppy drive, CD-ROM drives, monitor, keyboard and mouse. The system must function correctly with Windows NT 3.5.1.*

The Tribunal is of the view that the above section contemplates the modification of a platform with other components in order to meet the specific needs of the DFAIT. It requires that the platforms offered by bidders be certified to be Microsoft Windows NT 3.5.1 compatible. It clearly requires that any additional components, not included as part of the platform certification, be listed on Microsoft's Windows NT 3.5.1 hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements. The complainant appears to have interpreted section 2.2 of the procurement specification as allowing for a somewhat lower level of certification for the platform than for any additional components. In the Tribunal's opinion, the interpretation of section 2.2 cannot take place in a piecemeal fashion. The section must be read in its entirety and in context. If, as the complainant surmises, the section only required vendor certification of the platform, it stands to reason that additional components should be able to be certified in a similar manner. In addition, the use of the word "also" when describing the required means of certification for the components implies that a similar requirement was previously mentioned. In summary, the Tribunal concludes that section 2.2 requires the platform to be certified to be Microsoft Windows NT 3.5.1 compatible, which is demonstrated by being listed on the hardware compatibility list or by being OEM certified in accordance with Microsoft's NT certification requirements, and requires the components not included as part of the platform certification also to be listed on the hardware compatibility list or be OEM certified in accordance with Microsoft's NT certification requirements.

Concerning the technical evaluation of the complainant's offer, the Tribunal further determines, on the basis of information submitted by the complainant with its offer and in clarifying its bid to the Department, that the platform that it offered was not listed on Microsoft's Windows NT 3.5.1 hardware

compatibility list and that the system board included in its platform was equally not otherwise OEM certified in accordance with Microsoft's NT certification requirements at the time of bid opening. Accordingly, the Tribunal determines that the Department correctly interpreted the requirements of section 2.2 of the procurement specification and that it properly declared the complainant's offer non-compliant for failing to meet, at the time of bid opening, the mandatory certification requirements contained in section 2.2 and for failing to meet the mandatory requirements of paragraph 6 of the proposal requirements of the RFP concerning the provision of technical details.

In its comments on the GIR, the complainant submits that the procurement specification was not clear in all respects, e.g. the certification issue mentioned above and the testing requirements. In particular, the complainant submits that the RFP was not very clear concerning the evaluation methodology to be used by the DFAIT to test products offered by bidders. The Tribunal has already decided the certification issue. It will note, however, that, whenever a potential supplier is faced with allegedly unclear specifications and/or evaluation criteria, it is either invited in the RFP, as was the case here, or entitled more generally to seek clarification immediately from the contracting authority, including filing a complaint with the Tribunal, as it deems appropriate. In that sense, it is not held captive to the Department's decisions and may play a proactive role, as appropriate, to improve the bidding process for itself, any other bidders and the government.

In the GIR, the Department indicated that the DFAIT had decided to double up on the evaluation process or, in other words, to conduct concurrently the technical evaluation of offers and the testing of the products offered by potential bidders in order to meet the delivery requirements in the RFP. The Department suggests that, under normal circumstances, the technical evaluation would have been completed first, and only the offers meeting all mandatory evaluation criteria would have been tested. Consequently, the Department submits that, though the results of the product testing of the complainant's proposed workstation were available and though these results are in keeping with the findings of the technical evaluation, the said results were not necessary nor used to disqualify the complainant's offer. The evidence on the record and the Tribunal's decision on the certification issue support this position. Consequently, the Tribunal will not address the testing issue on the merit.

### **Determination of the Tribunal**

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted according to the AIT and NAFTA and that, therefore, the complaint is not valid.

Arthur B. Trudeau

Arthur B. Trudeau  
Member