

Ottawa, Wednesday, July 26, 1995

File No. 94N6660-021-0024

IN THE MATTER OF a complaint filed by R.E.D. Electronics Inc. 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* and section 11 of the *North American Free Trade Agreement Procurement Inquiry Regulations*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsection 30.15(4) and section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the complainant its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Lyle M. Russell

Lyle M. Russell

Member

Michel P. Granger

Michel P. Granger

Secretary

File No. 94N6660-021-0024

Date of Determination: July 26, 1995

Tribunal Member: Lyle M. Russell

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Shelley A. Rowe

Complainant: R.E.D. Electronics Inc.

Counsel for the Complainant: Michael S. Slan

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Background

On March 28, 1995, R.E.D. Electronics Inc. (the complainant) submitted a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) for the supply, Request for Proposal (RFP)/Solicitation No. EY 60074-4-2075/00/A, of distributed intelligent network hub systems, including installation, integration, the provision of cabling services and on-site maintenance services for a three-year period for the Department of Finance's internal network in Ottawa, Ontario.

The complainant alleges that the Department awarded the contract to a supplier whose proposal was not technically compliant with the mandatory requirements contained in the RFP. The complainant requests, as a remedy, that the contract be terminated and that all technically compliant proposals be reconsidered. In its response to the Government Institution Report (GIR), filed on May 31, 1995, the complainant revised its stated remedy in light of the fact that the contract had been substantially performed and asked for an order declaring the awarded contract technically non-compliant with the requirements contained in the RFP and reimbursing the complainant \$125,000 for gross profits that it would have earned, had it been awarded the contract, \$15,000 for costs incurred in preparing a response to the solicitation and \$4,000 for legal costs incurred in relation to filing and proceeding with its complaint.

On April 10, 1995, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *North American Free Trade Agreement Procurement Inquiry Regulations*² (the Regulations) had been met. Having made that determination, the Tribunal decided to conduct an inquiry into the complaint to determine whether the procurement was conducted in accordance with the requirements set out in Chapter Ten of the *North American Free Trade Agreement*³ (NAFTA).

1. R.S.C. 1985, c. 47 (4th Supp.).

2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547.

3. *North American Free Trade Agreement*, done at Ottawa, Ontario, on 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).

Inquiry

On May 5, 1995, the Department filed with the Tribunal a GIR, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*⁴ (the Rules), which report was made available to the complainant. On May 18, 1995, the Tribunal received and granted a request from the complainant, pursuant to subrule 104(3) of the Rules, for an extension of the deadline for receipt of comments on the GIR in order to permit it to employ counsel. On May 31, 1995, the complainant's comments on the GIR were filed with the Tribunal and sent to the Department.

Given that, in the opinion of the Tribunal, there was sufficient information on the record to determine the validity of the complaint and that the staff investigation did not reveal any information not available in the complaint or the GIR, on June 15, 1995, the Tribunal notified the parties that it intended to make a decision on the basis of the existing record and invited the parties to make further submissions. No further submissions were received.

Procurement Process

A "Notice of Proposed Procurement" appeared in the December 30, 1994, edition of Government Business Opportunities announcing the procurement and indicating that it was covered by NAFTA.

In the section entitled "Evaluation Procedures of the Proposal(s)," the RFP, dated December 30, 1994, with a bid receipt deadline of "1400 EDT" on February 8, 1995, contained the following statement:

The requirements of this Request For Proposal (RFP) are identified as either "Essential" (E) or "Desirable" (D). If an essential requirement is not complied with, the proposal will be considered non-responsive and will not receive further consideration. When an element of this RFP is considered essential it will be identified specifically with the word "Essential", an (E), or with a statement covering a section of this document. The words "shall", "must", "will" and "should" in this RFP and in all attachments are to be interpreted as Mandatory/Essential requirements.

A number of requirements contained in an attachment to the RFP, listed in the table of contents as "Annex 'A': Statement of Work" and entitled "Enhanced Network Management Requirements - Request for Proposal," are relevant to the Tribunal's consideration of the validity of the complaint and are quoted below, in part, with their headings:

1. GENERAL REQUIREMENTS
- 1.2. *Proposed Environment*
- 1.2.3. *For the purpose of this RFP, a distributed intelligent network hub (i.e. stack) is defined as a fully integrated combination of multiple intelligent network hubs to represent a single manageable network resource.*
2. TECHNICAL SPECIFICATIONS - INTELLIGENT NETWORK HUBS
- 2.1. *Physical requirements*

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

- 2.1.3. *Constraints*
 - 2.1.3.1. *It must be possible to mount all proposed distributed intelligent network hubs into standard 19” racks.*
- 2.2. *Hardware Requirements*
 - 2.2.2. *ODS Infinity Hubs Upgrade Option or Replacement Enterprise Network Hub Option*
 - 2.2.2.1. *The proposed solution must either (1) upgrade both existing ODS Infinity 1095 hubs as described in section 2.2.3, or (2) replace them by a single enterprise network hub as described in section 2.2.4.*
 - 2.2.4. *Enterprise Network Hub Option*
 - 2.2.4.1. *The proposed solution must include the cost of replacing both ODS Infinity 1095 hubs with an enterprise hub taken [from] the same OEM [original equipment manufacturer] product line as are the proposed distributed intelligent network hubs.*
 - 2.2.8. *Module adaptability*
 - 2.2.8.1. *All hubs must be independent from one another. Any distributed intelligent network hub must have the ability to provide network access on its own without reliance on any other unit.*
 - 2.2.9. *Memory*
 - 2.2.9.1. *All RMON [remote monitoring] management modules must have a minimum of 6 MB of dedicated memory to support the capture of RMON data. It must be possible to upgrade the dedicated memory to a minimum capacity of 10 MB using standard 70 NS 4 MB memory SIMMS.*
- 2.3. *Software Requirements*
 - 2.3.1. *Network Management software*
 - 2.3.1.8. *The proposed solution must support all standards based RMON capabilities as defined in RFC 1271:*
 - *statistics*
 - *history*
 - *alarm*
 - *host*
 - *hostTopN*
 - *matrix*
 - *filter*
 - *packet capture*
 - *event*
 - 2.3.1.23. *The proposed solution must provide integrated full-featured protocol analysis (including seven-layer decode, data capture, traps, and filters) within the distributed intelligent network hub. This must include full compatibility with Network Generals’ Sniffer protocol analyzer which is already in use within the department.*
- 2.4. *Functional requirements*

2.4.2. *Configuration and Management*

2.4.2.5. *Monitoring Facilities*

2.4.2.5.1. *The proposed equipment must have the ability to collect and store all traffic statistics internally within the distributed intelligent network hub without generating network traffic.*

2.4.2.5.2. *The proposed equipment must provide full RMON support as defined in RFC 1271.*

Before bid closing, some modifications were made to the RFP and a number of clarification questions were asked by suppliers, to which the contracting officer subsequently responded. In answer No. 10 of Update No. U003, section 2.2.9.1 was amended to read as follows:

All proposed RMON management modules must be configured with a minimum of four (4) MB of memory dedicated to the use of RMON data capture. It must be possible to upgrade this dedicated memory to a minimum capacity of eight (8) MB. A full description of the memory standards used and procedures for upgrading must be included.

As well, answer No. 12 of Update No. U003 reads, in part, as follows:

Full management capabilities are required for each distributed intelligent network [hub].

All potential bidders that had requested a bid set were sent the modifications and clarifications.

Five suppliers submitted proposals. The Department sought clarification from the eventual contract awardee and, once this was provided, the contract was awarded.

Discussion

Complainant's Position

The complainant contends that the proposal accepted by the Department did not comply with the requirements contained in the RFP. In the complainant's opinion, the proposed brand and model of hubs, being provided as the distributed intelligent network hubs, do not support all nine layers of RMON. The complainant argues that this does not comply with the requirements for full-featured protocol analysis within the distributed intelligent network hub, as specified in section 2.3.1.23 of the RFP, and for complete RMON capability, as specified in section 2.3.1.8. The complainant also alleges that, under the awarded solution, the data are collected within the enterprise hub and not the distributed intelligent network hub. The complainant argues that the product proposed also does not comply with the requirement that it have the ability to collect and store all traffic statistics internally within the distributed intelligent network hub without generating network traffic, as specified in section 2.4.2.5.1.

Department's Position

The Department submits that the contract awardee's proposal was compliant with the requirements contained in the RFP. In the GIR, the Department acknowledges that the complainant and the contract awardee interpreted certain essential requirements of the RFP differently and, in particular, the requirements

for RMON capability. However, the Department considers that both interpretations meet the essential requirements of the RFP. Its position on the issue of the requirement for full-featured protocol analysis within the distributed intelligent network hub is summed up in a memorandum, dated April 18, 1995, that was included as part of the GIR. It reads, in part, as follows:

Since the RFP technical specifications did not specifically exclude the ODS hubs from being part of the distributed intelligent network hubs, since we did not specify that RMON monitoring had to be concurrently active on all segments, and since the ODS hubs do provide full RMON capabilities: the evaluation team deemed the [contract awardee's] proposal to be compliant.

Validity of the Complaint

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 and that, at the conclusion of the inquiry, it determine whether the complaint is valid on the basis of whether the prescribed procedures and other requirements have been or are being observed. Pursuant to section 11 of the Regulations, the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA.

Article 1015(4)(d) of NAFTA requires that awards be made in accordance with the criteria and essential requirements specified in the tender documentation.

The Tribunal, in determining the validity of the complaint, has not assumed the role of a technical authority and applied judgement that is more appropriately exercised by the technical authority. However, the Tribunal has examined the wording of the technical specifications in the RFP in order to determine whether the decision made by the Department in accepting the contract awardee's proposal is supported by the wording of the essential requirements of the specification.

To assist in interpreting these essential requirements, the Tribunal has adopted generally accepted principles for the construction and interpretation of contracts. In particular, the Tribunal has taken the view that the various parts of the specification are to be interpreted in the context of the intentions of the Department and bidders, as evidenced from the RFP as a whole, and that any apparent inconsistencies between different requirements of the specification are to be resolved by finding an interpretation that can reasonably give meaning to each of the requirements of the specification.⁵ The Tribunal has also taken the view that the essential requirements of the specification should not be interpreted in an isolated and

5. See *BG Checo International Limited v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 23-24, in which the Supreme Court of Canada applied the principle as stated in K. Lewison, *The Interpretation of Contracts* (1989) at 124; *Chitty on Contracts* (26th ed. 1989), vol. I at 520. This principle was also applied by the Procurement Review Board of Canada in *A Complaint by Cheshier Equipment Ltd.*, Board File No. G92PRF6621-021-0039, March 9, 1993.

disjunctive manner, but that they should be interpreted as a whole with consideration of the overall purpose and objectives of the RFP.⁶

The Tribunal understands that the solution proposed by the contract awardee does meet the needs of the Department of Finance, in that, as a whole, it allows for the monitoring of the network and the collection of the data that results. Had the specification been written more in terms of performance criteria, the acceptance of a solution, such as that proposed by the contract awardee, might have been in accordance with the essential requirements of such a specification. However, the specification is written, to a large degree, in terms of specific design criteria, which has the effect of limiting the options available to the bidders by narrowing the range of acceptable solutions.

The Tribunal agrees with the Department's position that the specification does not require RMON monitoring to be concurrently active on all segments, and it also agrees that the ODS hubs in the proposed solution do provide full RMON capabilities. However, the issue to be resolved is whether or not it is reasonable to interpret that, since the specification does not specifically exclude the ODS hubs from being part of the distributed intelligent network hubs, the RMON analysis and data capture capability resident in the ODS hubs can be considered to be "within" the distributed intelligent network hubs when it is used for the purpose of monitoring the activity in a segment of the network.

The Tribunal finds that this interpretation is not supported by the wording contained in the specification when viewed as a whole and that the Department did not originally intend that interpretation, as evidenced in its proposal clarification questions sent to the contract awardee after bid closing. It is a fact that the specification does not contain a provision that specifically excludes the ODS hubs from being part of the distributed intelligent network hubs. There are, nevertheless, many sections that lead to the conclusion that the ODS hubs and the distributed intelligent network hubs are two separate and distinct elements of the overall network.

Section 1.2.3 of the RFP defines a distributed intelligent network hub or stack as a fully integrated combination of multiple intelligent network hubs to represent a single manageable network resource. Section 2.1.3.1 requires that it **must** be possible to mount all proposed distributed intelligent network hubs into standard 19" racks. Section 2.2.8.1 requires that all hubs **must** be independent from one another and that

6. See *Hillis Oil and Sales Limited v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57, in which the Supreme Court of Canada applied principles stated by Estey J. in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 901:

[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract;

and the principles stated by Dickson J. in *McClelland and Stewart Limited v. The Mutual Life Assurance Company of Canada*, [1981] 2 S.C.R. 6 at 19:

Taken alone and read without consideration of the scheme of the policy the kindred language of the self-destruction clause and the Declaration undoubtedly create a formidable argument in support of the case of the assurance company. It is plain however these cannot be read in an isolated and disjunctive way. The question before us is not to be determined on a mechanical reading of two phrases set apart, but rather on a reading of the policy and the Declaration in entirety.

any distributed intelligent network hub **must** have the ability to provide network access on its own without reliance on any other unit. Although section 2.2.4.1 would not apply as a requirement for a solution that proposes to upgrade the existing ODS hubs, it can be used to more fully understand what the specification, as a whole, intended and, as such, it does make a clear distinction between the distributed intelligent network hub and the enterprise hub. Finally, the summary cost table in Appendix G of the RFP shows a breakdown of costs, with separate entries for the replacement enterprise hub option, the ODS 1095 Infinity upgrade option and the distributed intelligent network hub with management capability.

In the Tribunal's opinion, the above-referenced sections, taken collectively, indicate that the distributed intelligent network hubs are separate and distinct from both the upgraded version of the ODS 1095 Infinity hub and the replacement enterprise hub. To be interpreted otherwise is contrary to the language of the specification. In order for the contract awardee's proposal to be considered responsive, it is necessary to ignore the overall meaning and intention of the specification. Although the solution proposed by the contract awardee may have met the performance objectives in an original and unique manner, to accept it, when it is not compliant with the wording of certain essential requirements of the specification, is a violation of Article 1015(4)(d) of NAFTA. The Tribunal determines that the proposal submitted by the contract awardee did not comply with certain essential requirements set out in the specification and, therefore, the complaint is valid.

The complainant initially requested, as a remedy, that the contract be terminated, on the grounds that the solution advanced by the contract awardee is technically non-compliant, and that all technically compliant proposals be reconsidered. In its response to the GIR, the complainant, given the fact that the contract had been substantially delivered and performed, revised its stated remedy and asked for an order declaring the awarded contract technically non-compliant with the requirements contained in the RFP and reimbursing the complainant \$125,000 for gross profits that it would have earned, \$15,000 for costs incurred in preparing a response to the solicitation and \$4,000 for legal costs incurred in relation to filing and proceeding with its complaint.

Where the Tribunal determines that a complaint is valid, in recommending an appropriate remedy, it is required, pursuant to subsection 30.15(3) of the CITT Act, to consider all the circumstances relevant to the procurement of the goods to which the designated contract relates, including the following:

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

Given that the delivery and installation of the equipment have now been completed in accordance with the time frames specified in the RFP and that the Department acted in good faith in its liberal, albeit erroneous, interpretation, the Tribunal will not make a recommendation to terminate the contract. Accordingly, the Tribunal will not recommend reconsideration of all technically compliant proposals, as was initially requested by the complainant. It remains, nevertheless, that the complainant did suffer a prejudice

certain, and, in consideration thereof, the Tribunal awards the complainant its reasonable costs in preparing a response to the solicitation and in filing its complaint.

Determination of the Tribunal

In light of the foregoing, pursuant to section 30.14 of the CITT Act and section 11 of the Regulations, the Tribunal determines that the complaint is valid.

Pursuant to subsection 30.15(4) and section 30.16 of the CITT Act, the Tribunal awards the complainant its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Lyle M. Russell
Lyle M. Russell
Member