



IN THE MATTER OF:

**A Complaint
By Network Support Inc.
of 818 Boyd Avenue, Unit B
Ottawa, Ontario**

**Board File No:
G93PRF6666-021-0017**

Complaint upheld in part

AND IN THE MATTER OF:

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

July 9, 1993

DETERMINATION BY THE BOARD

The Procurement Review Board (PRB or the Board) received a complaint, on April 13, 1993, from Network Support Inc. (Network). The complaint concerns the procurement by the Department of Supply and Services (DSS) of a Mass Storage Media System for use by the Maritime Coastal Defence Vessel, Project Management Office (MCDV/PMO) of DSS, located in Ottawa, Ontario.

The complainant alleges that the MCDV/PMO unfairly evaluated its technical response to a Request for Proposal (RFP). Network further alleges that the MCDV/PMO attempted to change the requirement, after the submission of proposals, in a way that was not compliant with the original specifications. Finally, the complainant alleges that the evaluation methodology, as it was practised in this case, is suspect.

The remedy requested by Network is that the RFP be withdrawn and a new RFP be issued with more detailed and precise specifications.

On April 21, 1993, the administrative and regulatory requirements all having been satisfied, the Board accepted the complaint for investigation.

DSS filed a Governmental Institution Report (GIR) with the Board on May 10, 1993. A copy of the relevant portions of the GIR was sent to the complainant who, in turn, filed comments with the Board on May 19, 1993. The complainant's comments were forwarded to DSS.

A copy of the Preliminary Investigation Report was sent to DSS and the complainant for their comments. Both parties responded with written replies which were then exchanged between them. These comments have been added to the Preliminary Investigation Report and form part of the Investigation Report (Report) as submitted to the Board.

The Report of this investigation contains a number of appendices relating to material and documents deemed relevant by the Board's investigative staff as part of their Report. Specific reference is not made to these appendices in this determination, but they have been made available to the parties and, subject to the provisions of the *Access to Information Act*, are available to any other person.

Because the investigation produced sufficient information to enable the Board, in its opinion, to resolve the issues raised in this complaint, it was determined that an oral hearing was not required, nor was one requested by either of the parties. The Board, in reaching its conclusions, has considered the complaint, the GIR, the complainant's response to the GIR, the Report of its investigative staff and comments made thereon by the parties, and has made its findings and determinations on the basis of the facts disclosed, the relevant portions of which are mentioned in this determination.

The Investigation

The allegations of this complaint, were investigated by the Board's staff by means of interviews and the examination of documents.

The following people were interviewed in person and/or by telephone to confirm various statements made and/or contained in the documentation:

Mr. Pierre Demers, Contract Management Officer, Office Automation, Services & Information Systems (OASIS), DSS, Hull, Québec. Mr. George A. Butts, Procurement Manager, and Mr. Kevin K. Yamamoto, Cost & Scheduling Officer, both of the MCDV Project Management Office, DSS, Ottawa, Ontario. Mr. W.P. Ruane, President, and Mr. Mark Scherling, Sales Manager, both of Network, Ottawa, Ontario. Mr. Bassam Barkout, Product Manager, B & Y Technological Enterprises Ltd. (BYTE), Ottawa, Ontario.

The Procurement

On December 8, 1992 a requisition was received by Central Allocations, DSS, from the Aerospace, Marine and Electronics Systems Directorate of DSS. The requirement was described as follows:

To purchase the following equipment for the MCDV PROJECT

1. *Mass storage Media System*
(see attached justification and specification)

On January 19, 1993, DSS prepared a Procurement Plan, in the form of a MEMO TO FILE. Under the heading "SOURCING:" the Contracting Officer indicated: *"It is proposed to 'Sole Source' this requirement to B & Y Technological Enterprises (B.Y.T.E.) as the proposed configuration is a BYTEQUEST Document Imaging System which utilizes proprietary software"*. No reference is made therein to whether or not the Free Trade Agreement (FTA) regime applies to this procurement. The Procurement Plan was prepared and approved by the Contracting Officer.

According to DSS, the decision to exclude the procurement from the FTA was based on the fact that they were purchasing, in part, software licenses which accounted for over 50% of the total value of the requirement. In their view, this decision was made in accordance with DSS OASIS Product Directorate Directive No. 0023 and was based on BYTE's proposal to the MCDV/PMO, dated November 20, 1992.

DSS prepared an "Advance Contract Award Notice" (ACAN) which appeared in the GBO of January 27, 1993, with the designation code O-3, meaning *"not subject to GATT or FTA - only one firm has been invited to bid"*.

After the publication of the ACAN, Network telephoned the Contracting Officer to challenge the ACAN. This conversation was followed up in writing by Network on January 29, 1993. On February 3, 1993 the Contracting Officer forwarded the challenge to the MCDV/PMO.

According to MCDV/PMO, and based on the information provided by Network, DSS judged Network to be a possible source of supply. Consequently, a meeting was arranged with Network for a demonstration of their system. The meeting was held at Network's facilities and was attended by the Cost & Scheduling Officer, the Contracting Officer, and a representative from the Project Management Office, Canadian Patrol Frigate Office (PMO/CPF). According to

DSS, they were given a demonstration of a system which did not include all of the features required, (i.e. bilingual hotkey and capability to use optical disks), but Network assured them that they could provide such features.

In a letter dated February 8, 1993, Network sent DSS the following additional information:

From our meeting this morning there were two issues:

For the scanning of E size documents, attached is a marketing bulletin from Kofax which announces the support for capturing C, D, and E size document images in January 1992.

The contact over at DSS Security is [name and phone number deleted].

For a Bilingual Hotkey to switch between English and French, in the Windows environment you can switch between a French Screen and an English Screen using a Hot Key (ALT TAB). So users can run the RIMS [Recorded Information Management System] and DIMS [Document Image Manipulation System] application using their language of choice, either French or English.

I trust this satisfies your clients [sic] requirements for the document management and imaging system so the bid can go competitive. If you have any questions or need further information please give me a call.

On February 9, 1993, the above information was relayed to the MCDV/PMO by facsimile.

A decision was made by DSS to open the procurement to competition and a Notice of Proposed Procurement (NPP) was published in the GBO of March 12, 1993 with the designation code O-1, meaning "not subject to GATT or FTA - all interested suppliers may submit a bid." The notice described the requirement as follows:

(This supersedes ACAN No. 66002-2-0940/000/A...) Mass storage media system for the Maritime Coastal Defence Vessel Project, with installation and integration. The system comprises of: one IBM 486-33 MHz compatible PC with 8 Mb RAM, one 300 Mb

hard disk, 1 optical 650 Mb worm drive, 1 "Cornerstone" 21 in. high resolution colour monitor, 1 "HP" Laserjet III printer, documentation and training.

On February 17, 1993, a RFP was issued with a closing date of March 10, 1993. The following instruction to bidders was set out in paragraph 4, Section C of the RFP:

It is essential that the proposal include a clear statement of the bidder's compliance with each article of this RFP. This statement must consist of one of the following three responses:

4.1 *COMPLY: Where the proposal complies with the article in all respects. With the exception of the technical requirements referred to below, no further explanation is necessary;...*

Paragraph 5 of Section A, entitled "*Evaluation Procedure*" reads, in part:

The Crown reserves the right to...request clarification or supporting data for any point in the proposals...

Part C of Appendix A of the RFP contains the following provision:

3. *Demonstration*

The vendors may be requested to arrange for specific product demonstrations. The objective of the demonstration will be to demonstrate to SSC that the proposed system meets functional and performance requirements. The failure to satisfy any of the mandatory requirements during this demonstration may cause the vendor to be considered non-compliant.

The demonstration must be performed by the vendor 30 working days after SSC transmits to the vendor a notification of the requirement to demonstrate. Failure to meet this deadline may result in the proposal being considered non-responsive.

Also contained in Part C of Appendix A is a requirement that a reference be provided:

5. Reference

A reference site within the National Capital Region of the Federal Government.

Under the "Reference" section, the complainant listed the names, contacts and telephone numbers of 10 RIMS and DIMS users.

According to MCDV/PMO, of the 10 references provided by Network, no system with RIMS, DIMS and optical disk reader combined, existed. Furthermore, MCDV/PMO indicated that these references generally did not know who Network was, but knew of Public Sector Systems (PSS). According to Network, the "references" given by them were not theirs nor PSS installations, but rather were provided, as is stated in their proposal, as users of RIMS and DIMS applications.

On March 22, 1993 DSS referred the proposals, minus the financial section, for technical evaluation to MCDV/PMO.

On March 24, 1993, MCDV/PMO sent a facsimile to the Contracting Officer, with the following query:

*A QUESTION TO ASK BOTH BIDDERS:
THE PMO MCDV HAS INVESTED A CONSIDERABLE AMOUNT INTO
POWERHOUSE DATABASE PROGRAMS. THE PMO WOULD LIKE THE
OPTION TO CHANGE THE DATABASE OF YOUR PROPOSED SYSTEM
TO A LAN OPERABLE POWERHOUSE DATABASE IN THE FUTURE.
CAN YOUR PROPOSED SYSTEM PERFORM THIS WITHOUT LOSS OF
DATA? HOW MUCH WOULD THE APPROXIMATE COST BE?*

On March 25, 1993, DSS sent the above message to both BYTE and Network requesting them to reply by March 26, 1993.

In a facsimile dated March 25, 1993 Network responded:

This is a change in the specification of the RFP and as per the telephone conversation with [name deleted] it is not included in the evaluation of the RFP but for information purposes only.

Yes the database can be changed into the PowerHouse database in the future without a loss of data. If the PowerHouse database is TBITS/NCTTI-2 compliant then the cost would be reasonable. A full evaluation of this change can be made as part of a change request after contract award.

On March 26, 1993, the Contracting Officer transmitted the above information to the MCDV/PMO by facsimile, with the message "...attached please find responses to your questions from the two bidders. I repeat, these answers should not form any part of your decision to declare a company non-responsive to the RFP".

A technical evaluation, which was completed by the MCDV/PMO on or about March 26, 1993, was transmitted to DSS by memorandum dated [in error] February 8, 1993, and reads:

Both proposals were very close in technical compliance and were professionally presented. However there is one major difference between the proposals.

The major concern with Network Support Inc's proposal regards the integration of the DIMS software to the RIMS software. Throughout NSI's proposal, there is little consideration given to how their records management software links with their data imaging system. Upon checking the references, I found only one of the ten endorsements is using the RIMS and DIMS system integrated together and that the user is only using magnetic hard drive storage as opposed to the optical disk drive system.

The BYTE system is presently operating in PMO CPF. The ARMIS records management software is integrated with the Bytequest imaging software and is functioning with the optical disk storage hardware.

Given the above points, I request that we proceed with the acquisition of the BYTE system.

On April 2, 1993, MCDV/PMO sent a memorandum to the Contracting Officer, with the comment "*JUSTIFICATION TO AWARD THE CONTRACT TO BYTE*". This memorandum reads:

In a [sic] telephone conversations with [name deleted] of the DSS Security Branch on 31 March and this morning, it was discovered that the system referred to does not have Network Support Inc. (NSI) as the prime contractor for this system. The prime contractor is Proterm for the system design, installation and integration. It is unknown what responsibilities NSI played in this system's installation or support. There is a higher risk in accepting NSI's proposal.

Another point is the Bilingual Hot Key issue. It was satisfactorily demonstrated on the BYTE system but non-existent on the NSI system. NSI would have to develop this feature and we require it to be a [sic] "Off the Shelf" system.

Given the above points, I request that we proceed with the acquisition of the BYTE system.

According to DSS, Network was advised by telephone that MCDV/PMO had found their bid to be non-compliant on 3 points. This conversation was confirmed by Network who stated in their letter of complaint that, on April 7, 1993, they were informed by telephone of the government's position.

An undated facsimile from Network and directed to the Contracting Officer was referred to MCDV/PMO with the remark, "*...attached are comments from NETWORK, would you please review and advise if this is satisfactory or you need further demonstration...*"

1) .BMP support

RIMS and DIMS are based on Microsoft Windows 3.X standards and .BMP is supported under Windows. RIMS and DIMS support Windows and .BMP format.

2) Bilingual Hotkey

RIMS and DIMS support hotkey using the standard Windows hotkey capabilities which provides the ability to move from one application to another within the Windows environment. The final copy of the French text version is in translation and scheduled for release shortly.

3) *Non-Production site*

As per our references on page 24 section 5.3.5 the House of Commons is in full production using both RIMS and DIMS. They currently scan and record documents using the Fujitsu scanner as proposed in the RFP. They are also operating in a bilingual environment which meets their requirements.

We have stated all these requirements previously and would suggest an on-site meeting to resolve any other differences or issues.

According to MCDV/PMO, a site visit to see the system at DSS Security Branch (Security Branch) was conducted on or about April 8, 1993. Only a representative from MCDV/PMO was present and a demonstration was performed by the operating personnel of the Security Branch. MCDV/PMO stated that the Security Branch system was "*more sophisticated*" than what was required by the MCDV/PMO, and still did not have all the features requested in the RFP.

In a letter dated April 13, 1993, Network filed the subject complaint.

According to the Contracting Officer, on April 16, 1993, the contract was awarded by telephone to BYTE.

On Monday April 19, 1993, an electronic message classified as "****IMPORTANT****" was transmitted from the Corporate Secretary's Office to the Contracting Officer. The message read, "*RE: BNY TECHNOLOGIES ENTERPRISES CONTRACT PROCEDURES MUST BE TERMINATED ASAP*".

On April 22, 1993, the following facsimile message was sent by the Contracting Officer to BYTE:

...would you please HOLD all deliveries UNTIL FURTHER NOTICE, for the supply of a Mass Storage Media System to the PCO/MCDV project. This action is taken as a result of a complaint received by the Procurement Review Board (PRB). I will advise you as soon as possible of any development in this regard. Thank you

According to DSS, the contract continued to be on hold as of June 3, 1993.

Discussion

Before addressing the merits of the complaint, it is necessary to deal with the issue of whether the proposed acquisition is a goods procurement covered under the FTA. This issue, raised by the government, relates to the Board's jurisdiction to hear this complaint.

In advancing its position on this question, the government refers to paragraph 5a) in the DSS Supply Policy Manual (SPM) 3005, entitled, "*Government Procurement Under Canada-U.S. Free Trade Agreement*":

The procurement is for goods or products through such methods as purchase, lease... Services are covered only to the extent that they are incidental to the supply of a particular product, accounting for less than 50 percent of the procurement under consideration.

The government goes on to argue that, as it intended to purchase "*mostly software products*", it considered its requirement to be a service procurement.

It is apparent to the Board that the essence of the intended transaction is the purchase of a system consisting of hardware, software and support requirements. In fact, DSS identified its requirement in its supporting documentation to the NPP as a goods class 7010 ADPE System Configuration. This reference is to the Federal Supply Classification Code (FSC) which is used in GATT to classify goods. The Board notes that the referenced provision (7010) speaks of an ADP system including software and reads, in part:

*A **specifically designed device [emphasis added]** incorporated into a system shall not influence the classification of the base assembly or unit.*

Class 7030 of the same Group (70) is entitled, ADP Software. This provision is also in reference to goods and contains the following exclusion:

*...**software designed to Government specifications [emphasis added]** to satisfy the requirements of a particular use or for use with ADPE properly classifiable in FSC other than FSC 70*

However, the intended procurement does not include the purchase of software designed to government specifications. Instead, the government wishes to purchase, among other things, "off the shelf" software that the vendor has sold and likely will continue to sell to others, all the while retaining its proprietary rights in the software. In other words, in this instance, the vendor intends, in addition to selling its software package, to grant a right to the government to use its software and, in this context, that right is neither a "good" nor a "service". Of course, the licensing fees, if any (Network does not specifically identify a licensing fee in its proposal), should form part of the procurement cost.

The Board concludes that the intended procurement is for the acquisition of goods which falls within its jurisdiction and, therefore, will make a determination on the complaint.

In response to Network's statement that MCDV/PMO attempted to change the requirement (after the submission of proposals), in a way that was not compliant with the original specifications, the Board reviewed the relevant evidence.

In the Board's view, the government did not improperly use the requested information in conducting its technical evaluation. Consequently, in this regard, the Board does not find for the complainant.

The other allegations made by the complainant, and addressed by the Board, concern the fairness of the technical evaluation of Network's proposal and the soundness of the methodology used in the evaluation of proposals.

In this context, it is incumbent upon the Board to determine whether or not the evaluation methodology stated in the RFP was used by the government in carrying out the evaluation of the proposals and whether it was correctly applied. To this end, the Board specifically reviewed the procurement process as it related to the evaluation of the proposals.

In a memorandum sent to DSS, dated [in error] February 8, 1993, MCDV/PMO stated that, "*[b]oth proposals were very close in technical compliance...*" This is followed by expressed reservations about Network's proposal as it relates to the integration of the DIMS software to the RIMS software and concludes that the contract should be awarded to BYTE.

On April 2, 1993, another related memorandum was sent by MCDV/PMO to DSS containing additional reasons for proceeding with the acquisition of the BYTE system. Reference is made therein to the system used by the Security Branch and the fact that Network was not the prime contractor. The memorandum reads, in part:

The prime contractor is Proterm for the system design, installation and integration. It is unknown what responsibilities NSI played in this system's installation or support. There is a higher risk in accepting NSI's proposal.

The memorandum then introduces another reason why the Network system is unacceptable:

...the Bilingual Hot Key issue. It was satisfactorily demonstrated on the BYTE system but non-existent on the NSI system. NSI would have to develop this feature as we require it to be a "Off the Shelf"...

The afore-mentioned information was communicated by DSS to Network which, on or about April 7, 1993, replied to the concerns raised.

After Network's reply, MCDV/PMO made a site visit to see a demonstration of the system used by the Security Branch. In addition to the operating personnel, only a representative from MCDV/PMO was present.

It is stated in the above-mentioned memorandum of February 8, 1993 that, although the technical authority considered both bids to be *"very close in technical compliance"*, it nevertheless thought that Network's proposal provided inadequate consideration for the linkage between its RIMS and DIMS. Given that Network's proposal states that it fully complies with the RFP, the government could have, in accordance with the RFP, asked Network for additional information (clarification or supporting data) to enable it to substantiate its initial findings prior to recommending that the contract be awarded to BYTE. It chose not to do so.

Although the government attempted to contact certain of Network's references with respect to the RIMS/DIMS linkages, under the circumstances, it is not surprising that the information being sought might not have been readily available from a particular reference.

The RFP did not stipulate the reason(s) for which references (sites) were required (i.e. business experience, benchmarking, assessment of technology, complexity of solutions proposed, etc.), leaving open the possibility that certain information would either be unobtainable or incompletely available from one or more of the references cited or perhaps could only be obtained from or more intelligently provided by the bidder whose proposal was in question.

When reviewing Network's proposal in this regard, one finds under "*References Contact telephone numbers for RIMS and DIMS users...*" It is noteworthy that this list of the 10 users cited thereunder differs from an earlier list contained in Network's proposal where 10 organizations are referred to in the section entitled "*Capabilities*". Network did not expressly or implicitly indicate in its proposal that any of the references cited had the system being offered to the government.

As well, in keeping with the terms and conditions of the RFP, the government could have chosen to ask Network for a demonstration at this stage, a matter to be more fully addressed later.

The subsequent memorandum, dated April 2, 1993, raises additional reasons to, in effect, reject Network's proposal. The technical authority again focused on a reference, this time, one (Security Branch) provided by Network at the request of DSS after the closing date for receiving proposals.

Once the government realized that the Security Branch did "*not have Network Support Inc. (NSI) as the prime contractor for this system*", and considering the "*higher risk*" factor they derived from this situation, why did the government not communicate with Network, given the importance that was attributed to this fact and in light of Network's full disclosure (in its proposal) that it enjoyed a close business relationship with the firms involved in setting up the Security Branch system? Further, it is not clear to the Board how such information, though significant in assessing a supplier's capability to deliver the contract and important in determining best overall value to the Crown, is, in fact, relevant to Network's technical compliance.

Finally, in the same memorandum, the technical authority raises the "*Bilingual Hot Key issue*", regarding its "*Off the Shelf*" availability. The Board recognizes the importance of this matter. Nevertheless, it need not address this issue since, in the end, the government (as expressed in the GIR) chose to base its decision to declare Network's proposal technically non-responsive on the basis of the demonstration that took place on or about April 8, 1993.

As indicated earlier, it was stated that, on April 7, 1993, DSS informed Network that MCDV/PMO had found their proposal to be non-compliant on three points. Network took exception with DSS comments and replied to them in writing. According to MCDV/PMO, they arranged for a site visit to take place on or about April 8, 1993 to see the system at the Security Branch. It is as a result of the demonstration that was conducted during this visit that Network's proposal was declared non-responsive.

The government response to the complainant's allegations is clearly set out in the GIR. In commenting on the fairness of the technical evaluation, the government stated:

The vendors may be requested to arrange for specific product demonstrations. The objective of the demonstration will be to demonstrate to SSC that the proposed system meets functional and performance requirements. The failure to satisfy any of the mandatory requirements during the demonstration may cause the vendor to be considered non-compliant.

It is significant that the government, referring, in part, to the above paragraph, stated, "the client declared NSI non-responsive as per above." Yet, as noted earlier, the demonstration involved only a representative from MCDV/PMO and the operating personnel at the Security Branch.

Furthermore, immediately following the above-noted paragraph, and also part of the same provision (Demonstration), is another paragraph of particular relevance to this aspect of the complaint. It reads:

*The demonstration must be performed **by [emphasis added]** the vendor 30 working days after SSC transmits to the vendor a notification of the requirement to demonstrate. Failure to meet this deadline may result in the proposal being considered non-responsive.*

Unlike what is contemplated in this provision, there is no evidence to support the contention that Network was requested or had delegated to the government the authority to arrange for "specific product demonstrations". In fact, the product evaluated by MCDV/PMO was not the same system as the one set out in Network's proposal.

The GIR further states:

The complainant was declared non-compliant as they failed to demonstrate an existing system with the required specifications upon benchmarking.

Again, no evidence was produced to indicate that Network was requested to demonstrate an existing system, nor was it shown that Network was provided with benchmarking specifications against which such system would be assessed.

The RFP did not include any benchmarking requirement and, in the Board's view, it was therefore procedurally incorrect for the government to conclude that Network "*failed to demonstrate an existing system with the required specifications upon benchmarking.*"

It is thus the Board's view that the evaluation performed on Network's proposal was procedurally flawed. Although the RFP provided an evaluation methodology, the government chose to use a different one to carry out its evaluation, or, alternatively, it incorrectly applied the one announced. In either case, the complainant was treated unfairly. The demonstration, once undertaken, should have been conducted in accordance with the expressed terms and conditions contained in the RFP. This was not done and, consequently, in this regard, the Board finds for the complainant.

In summary, this procurement action is covered by the FTA but was not conducted in accordance with the provisions of the *Free Trade Agreement Implementation Act*. The Board will, therefore, recommend that the current procurement action be cancelled and, if the need still exists, that it be re-tendered.

DETERMINATION

The Board has determined, on the basis of its investigation, that this procurement by the Department of Supply and Services failed to comply with Article 1305 of the Free Trade Agreement. Specifically, DSS failed to conduct the evaluation as provided for in the Request for Proposal which resulted in the complainant's offer being unfairly declared non-responsive.

The Board has decided to award the complainant reasonable costs relating to the filing and pursuit of its complaint.

The Board has also decided to recommend that the current procurement action be cancelled and, if the need still exists, that it be re-tendered.

J. Craig Oliver

J. Craig Oliver

Chairman

Procurement Review Board of Canada