



IN THE MATTER OF:

**A Complaint
By Nicolet Instrument Canada Inc.
of 1 - 1200 Aerowood Drive
Mississauga, Ontario**

**Board File No:
G92PRF66W-021-0031**

Complaint upheld

AND IN THE MATTER OF:

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

January 13, 1993

DETERMINATION BY THE BOARD

The Complaint

On October 13, 1992, the Procurement Review Board (PRB or the Board) received a notice of complaint from Nicolet Instrument Canada Inc. (Nicolet). With the receipt of additional information from Nicolet, the complaint was filed on October 19, 1992. The complaint concerns the supply of a Nicolet digital storage oscilloscope and accessories for the Department of National Defence (DND). In its complaint, Nicolet alleges that the equipment purchased by the Department of Supply and Services (DSS) through Metrone Corporation (Metrone), the contract awardee, is not warranted by Nicolet Instrument Corporation of Madison, Wisconsin, and cannot be serviced by Nicolet as Metrone is an unauthorized agent that has no association with Nicolet. The complainant also alleged that DSS violated their "Open Bidding" agreement with Nicolet by not requesting a "re-bid" or "re-quote" of this contract. The remedy requested by the complainant is that it be awarded the contract at the price stated in its complaint.

The complaint met the criteria for filing (subsection 21(1)) of the *Procurement Review Board Regulations* (Regulations). The receipt of the complaint was acknowledged to the complainant.

On October 26, 1992, the Board accepted the complaint for investigation as, on its face, it met the criteria for acceptance (subsection 28(1) of the Regulations) and timeliness (subsection 23(2) of the Regulations). A notice of complaint was published in the *Canada Gazette, Part I* and the *Government Business Opportunities* (GBO). DSS was officially notified and sent a copy of the complaint.

DSS filed the Governmental Institution Report (GIR) with the Board on November 16, 1992. A copy of the relevant portions of the report was sent to the complainant who, in turn, filed comments with the Board on November 25, 1992. The complainant's comments were forwarded to DSS.

A copy of the Preliminary Investigation Report (PIR) was sent to DSS and the complainant for their comments. Both parties responded with written replies which were then exchanged between them. In their reply, DSS indicated, *inter alia*, that the PIR was incorrect in a particular statement of facts dealing with evidence indicating when the complainant knew or should have known the basis of its complaint and, possibly, the timeliness of its complaint to the Board. A Supplement to the PIR dealing with this question was prepared by the Board's staff and was sent to the parties for their comments. Neither party commented on the Supplement. The comments referred to above have been added to the PIR and form part of the Investigation Report as submitted to the Board.

The Report of this investigation contains a number of appendices containing material and documents deemed relevant to their report by the Board's investigative staff. Specific reference is not made to these supporting documents 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. The Board, in reaching its conclusion, has considered the complaint, the GIR, the complainant's response to the GIR, the Report of its investigative staff including the PIR, the comments made thereon by the parties, and the Supplement to the PIR, and has made its findings and determinations on the basis of the facts disclosed therein, the relevant portions of which are mentioned in this determination.

The Investigation

The complainant's allegations, the government's response to those allegations, and the complainant's comments on the government's response were investigated by means of interviews and the examination of documents. The individuals interviewed are:

Ms. Carole Bouchard, Contracting Officer, DSS Ste-Foy, Québec; Mr. Andy Metelka, Product Manager, Nicolet, Mississauga, Ontario; Mr. Pierre Bélanger, Supervisor Technologist, DND, Defence Research Establishment (DREV), Valcartier, Québec.

The Procurement

On January 23, 1992, DSS-Québec received a requisition from DND for a Nicolet digital storage oscilloscope complete with accessories. The manufacturer and the supplier were stipulated under the instructions part of the requisition as follows:

*Manuf: Nicolet
Fourn: Technolor Instrument Inc.
3274 Boul. St. Martin Ouest
Suite 106
Chomedey-Laval, Québec*

A Round Trip Memorandum from DND stating [TRANSLATION] "*Please proceed with proposals for this item; however, do not issue contract without final approval from DREV*" was attached to the requisition.

DSS prepared a Notice of Proposed Procurement (NPP) which appeared in the GBO of February 5, 1992 in the GATT/FTA section under Proposed Procurements with the designation code F-1, meaning, Free Trade procurement -- open to all interested suppliers.

A Request for Proposal (RFP) dated January 30, 1992 with a closing date of March 17, 1992 contained the following clause: [TRANSLATION] "*Your proposal will be considered provided delivery can be effected by: March 31, 1992.*"

The RFP incorporated Standard Instructions and Conditions DSS-MAS 9403 which state, in part, under paragraph 2 of section A entitled INSTRUCTIONS:

The lowest or any offer will not necessarily be accepted...Offers will remain open for acceptance for a period of not less than 60 days from closing date of this solicitation, unless otherwise indicated herein by SSC [Supply and Services Canada].

Included in the RFP is a clause referred to as [TRANSLATION] "*GENERAL CONDITIONS*" which states, in part, [TRANSLATION] "*these general conditions and clauses form part of this Request for Proposal as though expressly set out herein.*" The RFP does not include any clauses modifying the sixty-day period mentioned above.

Also included in the RFP is the following clause:

[TRANSLATION]

EVALUATION OF PROPOSALS:

b) Supply and Services Canada will evaluate proposals received taking the following factors into consideration:

- i) Compliance with the terms and conditions of this Request for Proposal.*
- ii) The lowest evaluation price delivered at destination having regard to exceptions, alterations and qualifications to the specifications.*
- iii) Assessment of all technical documentation and information.*
- iv) Delivery date.*

. . .

d) The Crown reserves the right to negotiate changes to the technical requirements or to the terms and conditions. Alternatively a proposal may be accepted without negotiations.

A document dated March 30, 1992 entitled [TRANSLATION] "*List of Orders in Abeyance at SSC*" was distributed to the buyers. A handwritten note, dated April 9, 1992, was added to the bottom of the list and signed by the buyer's supervisor:

[TRANSLATION]

Here is the list of the Requests which are still in abeyance since the freeze. Do not issue any contract for these requests without the authority of the purchasing office of DREV. You can issue contracts for all other request not on this list.

The procurement which is the subject of this complaint appears on that list.

Five suppliers submitted proposals. DSS tabulated the proposals received and, on April 14, 1992, sent the package (which included prices) to DND for technical evaluation.

The technical evaluation report, dated April 29, 1992, was transmitted to DSS by DND. In the report, two of the systems offered were rejected as not meeting the required specifications. One other system was described as appearing to meet the specifications but was more expensive than the other acceptable systems. The two remaining systems were assessed as follows:

[TRANSLATION]

The system submitted by METRONE CORPORATION is the same as the one submitted by NICOLET INSTRUMENT CANADA but at [amount deleted] lower than the latter.

CONCLUSION

Even though METRONE CORPORATION's bid is slightly lower than NICOLET INSTRUMENT CANADA's bid, I would opt for the latter, to avoid having to go through a third party in order to obtain information or to enforce the guarantees.

On or about July 3, 1992, the contracting officer conducted a review of all outstanding files and, upon discovering that the file which is the subject of this complaint was still open, decided to verify the status of the request with DND. According to DSS, they were advised verbally by DND that the equipment was still required and that since funds were available, DSS should proceed with the procurement.

According to DSS, it was decided to obtain confirmation from the lowest bidder. Metrone was therefore contacted the same day to verify if the prices submitted in its offer of March 1992 were still valid. No other bidder was contacted.

A facsimile message dated July 6, 1992 addressed to DSS from Metrone states: "*REFERENCE: QUE91-02531-512-A WE CONFIRM OUR PRICES AS QUOTED.*"

On July 8, 1992, DSS informed Metrone by telephone that it had been awarded the contract, which included a delivery date of eight weeks after the contract date. The equipment was received by DND the last week of August 1992.

Discussion

Before addressing the merits of the complaint, it is necessary to deal with the question of the timeliness of the complaint, an issue raised by the government and which relates to the jurisdiction of the Board to hear this complaint.

Subsection 23(2) of the Regulations reads:

a complaint shall be filed not later than 10 days after the basis of the complaint is known or should reasonably have been known, whichever is earlier.

In its complaint of October 19, 1992, Nicolet states:

I was informed of this situation [that a contract had been awarded] by my authorized representative, Technolor Instrument Corporation on October 9, 1992.

In the GIR, the government stated that the complainant or its representatives were aware of the contract award well in advance of October 9, 1992 since the DND end-user communicated with Nicolet during the first week of September 1992 regarding the equipment.

The early September 1992 communication referred to by the government is a facsimile transmission (facsimile) sent to Nicolet by the DND end-user. The complete text of the communication reads:

Would you please send me Macintosh sample programs. I would like to transfer data files from my new Nicolet PRO40 to my MAC.

The investigation revealed that, subsequent to receiving the facsimile, Nicolet had contacted the end-user to confirm that a contract had been awarded for this procurement. Nicolet then contacted the contracting officer at DSS to complain about the situation. Nicolet stated that these conversations took place after it was notified on October 9, 1992 by its authorized representative in Montréal that the contract had been awarded for this procurement. According to DND, their conversation with Nicolet occurred several weeks (possibly 3 to 4) after the facsimile of September 9, 1992. DSS indicated that their conversation with Nicolet occurred near the end of September or early October.

The Board notes that the complainant was not informed by the government of the contract award within "*seven working days from the date of the award of the contract*" as is required under Article VI:4 of the *General Agreement on Tariffs and Trade, Agreement on Government Procurement* (the Code). The Board also notes that no Contract Award Notice was published for this contract within the time frame (60 days after award) prescribed for such notices under Article VI:1 of the Code. The fact that there was a facsimile between the government and Nicolet on September 9, 1992 is not in question. Furthermore, it appears from the undisputed information presented to the Board, the next communication on this matter between Nicolet and the government took place after October 9, 1992.

The issue left for the Board to decide is whether the facsimile of September 9, 1992 adequately substantiates the view that the complainant knew or should reasonably have known of the basis of its complaint on or about September 9, 1992.

The Board finds that the facsimile is not sufficient by itself to disclose the fact that a contract award had been made. In the circumstances, the Board accepts the complainant's claim as to when it became aware of the basis of its complaint and concludes that it acted within the prescribed time frames.

In its comments on the GIR, Nicolet addressed the issues of the **warranty** and **support** for the product. In particular, it stated that it does not wish to dwell on these issues unless requested. As well, Nicolet indicated that it does not expect the Board to make a judgement in this area. In the circumstances, the Board considers this part of the complaint to be withdrawn.

In addressing the merits of Nicolet's complaint, the Board must determine whether or not the government has, using the terms of the complainant, violated their "Open Bidding" agreement with Nicolet by not requesting a re-bid or re-quote of this contract. The Board must, therefore, determine whether or not the government acted properly in the circumstances given the procedural requirements of the Free Trade Agreement (FTA) and the Code.

The key facts of this case can be summarized as follows:

- a) On February 5, 1992, the government issued an NPP for the acquisition of a Nicolet digital storage oscilloscope under code F-1, which means, Free Trade procurement -- open to all interested suppliers.
- b) The terms and conditions for the competition were included in an RFP dated January 30, 1992 with a closing date of March 17, 1992.
- c) On May 1, 1992, DND advised DSS not to issue a contract for this requirement as it may be cancelled.
- d) The RFP included, *inter alia*, a delivery date of March 31, 1992 and a price "open for acceptance period" of not less than 60 days from the bid closing date or May 19, 1992.
- e) DND technical evaluation report dated April 29, 1992 declared that three bidders, including Nicolet, were responsive with respect to the technical specifications.

- f) On or about July 3, 1992, some 94 days after the delivery date stated in the RFP and some 47 days after the expiration of the 60 days "open for acceptance period", DSS contacted Metrone, the lowest priced bidder, to confirm its prices. No other bidders were contacted.
- g) On July 8, 1992, DSS awarded a contract to Metrone.
- h) The delivery of goods was completed by the end of August 1992, some 5 months after the March 31, 1992 date stated in the RFP of January 30, 1992.
- i) The terms and conditions of this RFP were not modified after their issuance on January 30, 1992 nor was the procurement action formally cancelled by the government. Enquiring suppliers were, however, informed of the expenditure freeze.

The Board is of the view that this procurement action was in jeopardy as soon as it became evident that the March 31, 1992 delivery date stated in the RFP would not be met. No action was taken by the government to remedy this situation. Similarly, there was no action taken to modify the deadline for acceptance.

The government explained their approach in part by saying that, in their opinion, an expenditure freeze is equivalent to a suspension and that a natural consequence of a suspension, as long as it is reasonable in length, is to also suspend the time for the bids. A condition of this nature could have been invoked if it had been announced in the RFP, in accordance with Article V:13(j) of the Code, so that all bidders could be aware of the effects of such a condition and act accordingly. This was not done.

The government recognizes that such a suspension may not be considered by all to be a natural result of an expenditure freeze and that the DSS policy (SPM directive No. 3151) provides the contracting officer some direction in this area and some discretion since the policy uses the term "may". The relevant portion of this policy, which is also quoted in the PIR, reads:

*5. When the bid acceptance period expires before a contract is placed, the merit of requesting all bidders to confirm their bid **may** [emphasis added] be considered. Confirmation shall be obtained from the bidders in writing. Should any one of the bidders choose not to confirm a bid, the bid solicitation must be reissued.*

In the Board's view, the only discretion that can be exercised by the contracting officer pursuant to this paragraph is to consider the merits of requesting **all** bidders to confirm their bids. The alternative is to cancel the procurement altogether and to re-issue the NPP and not to contact only one bidder, as was done in this instance.

What we have here is a procurement action that was delayed subsequent to an expenditure freeze at DND. This delay endured until after the expiry of the bid acceptance period of not less than 60 days after bid closing, a period in accordance with the general provisions of Article V:13(d) of the Code. Given that no changes were made to the RFP, the terms and conditions contained therein and in the bids were no longer binding on the bidders.

The fact that the government had not formally cancelled this procurement action is, in the Board's opinion, indicative of its desire to proceed with this procurement on a competitive basis. However, the Board is of the view that contacting only Metrone on July 3, 1992, for the purpose of confirming its prices, is tantamount to a single tendering procurement action conducted without notice and without proper justification, as required by the FTA and Article V:16 of the Code. No such justification is presented by the government since they were operating under the assumption that they were simply resuming the "suspended" procurement action following the DND expenditure freeze.

The Board concludes that the government has acted contrary to the Code and, specifically, conducted a sole source procurement without justification to do so. For these reasons, the complainant prevails.

In its complaint, Nicolet requested as a remedy that it be awarded the contract. This is not possible since the procurement action on which it bid was, in effect, cancelled for the reasons already expressed.

Is this, however, the only remedy available to Nicolet, who not only bid on this requirement but incurred costs to do so? The Board was faced with a comparable situation in Waters Chromatography (Board File No. E91PRF6631-021-0002, April 29, 1991) where no notice of a government procurement, intended to be sourced openly was given, thus preventing a potential supplier, whose interest to bid was clearly established, to do so.

Similarly, in this case, the government's conduct had the effect of preventing a potential supplier from competing and possibly being awarded a procurement contract. In other words, Nicolet suffered a loss of opportunity. It is thus left to the Board to determine what damages were suffered by Nicolet.

Taking into consideration Nicolet's documented interest to bid on this requirement, the fact that five interested suppliers bid, including Nicolet, on the previous procurement action, the fact that the product offered by Nicolet, or its equal, is the one the government is interested in buying, and the fact that the government intended to source this requirement competitively, the Board concludes that there is no reason to believe that this possibility would be substantially different than the one that existed in the previous procurement action. On this basis, the Board estimates the possibility that Nicolet would win such an action at one in five and will, therefore, recommend that the complainant be paid a compensation equal to 1/5 of the profit, if any, it would have made had the contract been awarded to it, at the price stated in its complaint of October 19, 1992.

DETERMINATION

The Board has determined on the basis of this investigation that this procurement by the Department of Supply and Services did not comply with the requirements of section 17 of the *Free Trade Agreement Implementation Act* in that it did not provide all potential suppliers equal opportunity to be responsive to the requirements of the procuring entity in the tendering and contract award phases.

The Board has also decided to award the complainant reasonable costs relating to proceeding with the complaint.

The Board recommends that DSS develop, jointly with the complainant, a proposal for compensation based on 1/5 of the profit, if any, Nicolet would have made had it been awarded the contract at the price stated in its letter of complaint of October 19, 1992, that the Board could recommend as fair and reasonable damages for the loss of opportunity to bid on this procurement and to profit therefrom. This proposal is to be presented to the Board within 30 days of the date hereof.

J. Craig Oliver

J. Craig Oliver

Chairman

Procurement Review Board of Canada