

Ottawa, Friday, March 8, 1996

File No.: PR-95-018

IN THE MATTER OF a complaint filed by Cabletron Systems of Canada Ltd. 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. Therefore, the Tribunal's postponement of award order dated December 14, 1995, is no longer in effect.

Arthur B. Trudeau

Arthur B. Trudeau  
Member

Michel P. Granger

Michel P. Granger  
Secretary

**File No.: PR-95-018**

Date of Determination: March 8, 1996

Tribunal Member: Arthur B. Trudeau

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Joël J. Robichaud

Complainant: Cabletron Systems of Canada Ltd.

Government Institution: Department of Public Works and Government Services

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### **FINDINGS OF THE TRIBUNAL**

#### **Introduction**

On December 11, 1995, Cabletron Systems of Canada Ltd. (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. EY M9087-5-1403/000/B) for the supply, by means of a National Individual Standing Offer, of concentrators (wiring hubs) and Ethernet switches for the Royal Canadian Mounted Police (RCMP) across Canada.

The complainant alleges that this requirement was originally issued in draft form as a restrictive product specification rather than a functional competitive specification. It states that, though the draft specification was amended during the bidding process, the final version of the technical specification, Appendix A to the solicitation document (the Specification), remained restrictive at bid closing time on December 6, 1995, thereby eliminating the complainant from the bid in favour of the competition. The complainant requested, as a remedy, that the Department place the subject file on hold and proceed with a "bid repair cycle," including an amended functional Specification and a modified bid closing date.

On December 14, 1995, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (the Regulations) had been 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 Ten of the *North American Free Trade Agreement*<sup>3</sup> (NAFTA) and Chapter Five of the *Agreement on Internal Trade*<sup>4</sup> (the AIT). On the same day, the Tribunal issued an order postponing the award of any contract in this matter until it determined the validity of the complaint.

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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, as amended.
  3. 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).
  4. As signed at Ottawa, Ontario, on July 18, 1994.

## **Inquiry**

On January 8, 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>5</sup> The complainant's comments on the GIR were subsequently filed with the Tribunal. On January 23, 1996, the Tribunal requested that the complainant clarify portions of its comments on the GIR. On January 25, 1996, the Tribunal requested that the Department respond to the clarifications received from the complainant on January 24, 1996. The Department and the complainant filed their final comments with the Tribunal on January 31 and February 8, 1996, respectively.

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 June 21, 1995, a letter of interest was published on the Open Bidding Service (OBS) and in Government Business Opportunities (GBO). The purpose of the letter of interest was to provide the industry with an opportunity to review the draft technical specification describing the RCMP's requirement for wiring hubs and Ethernet switches and to provide constructive feedback. The complainant, in a letter to the Department dated June 30, 1995, highlighted several problematic sections in the draft specification concerning mostly the wiring hubs and emphasized the product-restrictive nature of certain requirements. Concerning the Ethernet switches, the complainant assessed that the bulk of the draft specification was taken directly from a single manufacturer's product and objected to this approach to competitive bidding.

On October 25, 1995, a Notice of Proposed Purchases was published on the OBS and in the GBO. A Request for a Standing Offer (RFSO), including the Specification at Appendix A, was also made available to all potential suppliers.

Section E of the RFSO (Evaluation Procedure) provides, in part, that, when an element of the RFSO is considered essential, it will be identified specifically with the word "Essential" or "Mandatory." It states that the words "shall," "must" and "will" are to be interpreted as mandatory requirements. It also states that, if an essential requirement is not complied with, the proposal will be considered non-responsive and will not receive further consideration. Finally, it states that the successful bidder will be the bidder which submitted the lowest evaluated cost-responsive proposal, as defined in the RFSO.

During the period from November 3 to December 6, 1995, the date of bid closing, the Department issued 18 updates to the RFSO. All updates were communicated to interested suppliers through the OBS. On November 20, 1995, the complainant wrote to the Department seeking clarifications on a number of points dealing with various aspects of section 5.0 of the Specification. The Department answered the complainant's questions through RFSO Update U016 dated November 24, 1995, and by facsimile dated the same day.

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

The sections of the Specification at issue, the questions raised by the complainant in its November 20, 1995, letter to the Department in respect thereof and the Department's answers, in part, follow:

**5.2.10** *The FDDI [fibre distributed data interface] interface must support control of external optical bypass switch using a standard six pin DIN connector.*

Question: *Due to the inherent fault tolerance built into FDDI could the crown clarify why an optical bypass switch would be required?*

Answer: *This will provide double redundancy on the FDDI network.*

**5.2.11** *The switch must be compatible with the 10 Base-T vendor's community in general. The Bidder must provide a written declaration of inter-operability with other 10 Base-T products specifically Synoptics and 3 Com.*

**5.2.13** *The switch must be compatible with the 100 Base-T vendor's community in general. The Bidder must provide a written declaration of inter-operability with other 100 Base-T products including 100 Base-T Network Interface Cards.*

**5.2.3** *The type 2 Ethernet Switch must provide a 100 Base-T interface as per IEEE [Institute of Electrical and Electronic Engineers] 802.3u or a Fibre Distributed Data Interface (FDDI) interface. The Bidder must state the maximum number of FDDI and/or 100 Base-T ports supported by the proposed switches.*

Question: *According to 5.2.3 you can do FDDI or 100 Base-T. If we do the former does that mitigate the requirement in 5.2.13, and 5.2.14?*

Answer: *It does eliminate 5.2.13, but the Bidder must still be compliant with 5.2.14.*

**5.2.14** *The proposed type 2 Ethernet switch must support a minimum of six (6) virtual LAN's [local area network].*

**5.2.17** *For type 2 Ethernet switches, the Bidder must state if traffic can be sent between two (2) virtual LAN's on the same switch without the use of an external bridge or router.*

**5.2.18** *For type 2 Ethernet switches, the Bidder must state how MAC [media access control] address table information is exchanged between two (2) switches sharing the same virtual LAN.*

Question: *As there is no current IEEE standard for VLAN's [virtual local area network], which proprietary VLAN implementation does [the] RCMP wish to adopt?*

Answer: As mentioned by the Bidder, there are currently no IEEE standards for VLAN's. However, sections 5.2.17 and 5.2.18 do not refer to any proprietary implementation but asking the Bidder if and how the requirements can be met.

**5.4.11** The proposed type 2 Ethernet switches must support virtual LAN using OSI [open systems interconnection] layer 2 or 3 method of operation. The Bidder must state which method of operation is supported.

**5.4.12** The type 2 Ethernet switches which support virtual LAN using OSI layer 3 of operation must support IP [Internet Protocol], IPX [Internet Packet Exchange] and DECNet protocols.

Question: Since [the] switches operate at the Layer 2 level of the OSI layers, why is there a requirement for layer 3 [functionality]?

Answer: As stated in requirement 5.4.12, "...the switches which **support virtual LAN using OSI layer 3** must support...."

**5.3.1** The switch must have a latency of less than 130 micro seconds for 64 byte packets and 1,300 micro seconds for 1518 byte packets. The latency time is measured from the transmission of the first byte on the source port to receiving the first byte on the destination port.

**5.3.2** The proposed Ethernet switches must be able to work at wire speed (14,880 packets per second) on all 10 MBps [megabits per second] Ethernet ports. The Bidder must provide test data for a minimum of five (5) ports input and one (1) output port with frame sizes 64 and 1518 bytes.

**5.3.3** The proposed Ethernet switches must not exceed the following frame loss percentage:

Frame Size	Percentage Loss
64 Bytes	18%
256 Bytes	10%
1518 Bytes	1%

The Bidder must provide test data for a minimum of five (5) ports input and one (1) output port for each frame [size] listed above while running at 100% capacity on the input.

**5.3.4** All performance information must be supported by independent product testing and must be supplied with the bid. Harvard Internetworking Laboratories test results is preferable, if available.

Question: *Deletion of 256 Bytes and 1518 Bytes as no “Harvard” testing exists for vendors with this parameter.*

Answer: *Testing for 256 and 1518 bytes testing can be found in Data Communications, July 1995.*

**5.3.5** *The proposed type 2 Ethernet switch, which provides an FDDI interface, must be able to forward sixty thousand (60,000) frames per second without loss of traffic, with ten (10) 10 MBps interface sending sixty-four (64) bytes frame at wire speed simultaneously. The latency for sixty-four (64) bytes packet must not exceed two hundred and twenty (220) micro-seconds from the first byte in the high speed port to the first byte out of a low speed port and vice-versa.*

Nine proposals were received and sent to the RCMP for technical evaluation. The complainant did not submit a bid and filed this complaint with the Tribunal on December 11, 1995.

## **Validity of the Complaint**

### The Complainant’s Position

In its comments on the GIR and subsequent submission to the Tribunal, the complainant states that it has no difficulty with the fact that nine bidders representing three original equipment manufacturers (OEMs) find the RFSO non-restrictive. This, indeed, supports its allegation that the Specification favours certain equipment manufacturers to its detriment. The complainant also states that the issues relating to the wiring hubs, specifically the issue of port density, have been resolved to its satisfaction. The remaining issues, to which the complainant submits that it was unable to attend as fully as it might have wished due to the short period to bid, the efforts required to resolve the issues relating to the wiring hubs and other concurrent and competing requirements, concern mainly Ethernet switches, specifically section 5.3.2 of the Specification (wire speed performance), section 5.3.3 (frame loss) and section 5.2.14 (virtual local area network [VLAN]). The complainant alleges that the above specifics are examples of restrictive specifications limiting the complainant’s ability to successfully bid on these requirements. In addition, the complainant, in its letter of January 23, 1996, to the Tribunal, indicated that the port density selection described in section 5.0 of the Specification is not a fair representation of a competitive analysis of the marketplace; that the optical bypass switch (section 5.2.10) is an unnecessary requirement; that the reference to vendor-specific compatibility in section 5.2.11 encourages the acceptance of a proprietary solution; that the request for RMON (remote monitoring) in one class of equipment, that is, the wiring hubs, but not in another, that is, the Ethernet switches, is inconsistent with the stated functionality of the RCMP’s requirement; that VLANs (sections 5.2.17, 5.2.18, 5.4.11 and 5.4.12) are not a standard and should be dropped; and that the requirement for 60,000 frames per second (section 5.3.5) is an artificial requirement setting an arbitrary benchmark. In summary, it is the complainant’s view that it has provided a substantive body of information concerning restrictive tendering specifications. Its intention in so doing, however, is not to engage the RCMP and the Department in a discussion as to whether the operational integrity of the RCMP RIBboN (RCMP Integrated Backbone Network) project is, or is not, threatened by such factors as frame loss, RMON or VLANs. On the contrary, it is attempting to promote best value to the government by requesting the application of fair procurement policies.

### The Department's Position

In response to the complainant's comments on the GIR and other submissions, the Department submits that the Specification is functional in nature and not restrictive or product-specific. The nine bids received in response to this solicitation, and which offer different products, support this assertion. It further indicates that the government is not prepared to alter the RCMP's requirement to accommodate the products of any particular supplier. This, the Department submits, would be unfair to other potential suppliers and in breach of the requirement not to treat any supplier less favourably than another supplier. Concerning the allegation that the Specification is biased against the complainant, but not other vendors, the Department submits that it is virtually impossible for a technical specification of this kind to be written to favour a number of vendors and to eliminate just one. The Department concludes on this point by stating that the Specification was written to meet the requirement necessary for the RCMP to provide a mission critical network and that the Specification was opened up to allow bidders the possibility to propose multi-OEM solutions.

Concerning the specific issues raised by the complainant, the Department notes that these were raised late in the bidding process, but it responded, nonetheless, to all of them.

The requirement for 100 percent wire speed throughput (section 5.3.2) is justified in light of the need to ensure the "timely dissemination of data" to approximately 22,000 regular members, civilian members and public service employees across Canada by means of a system which will interconnect LANs, workstations and mainframes onto a wide area network backbone through which internal and external data services will be available. Further, the Department states that 69 percent of the switches on the market are able to meet this requirement.

Concerning the issue of frame loss (section 5.3.3), the Department, after noting that zero frame loss would be ideal, states that most Novell packets on the RCMP network are 68 bytes and, therefore, the frame loss requirement stated in section 5.3.3 represents, contrary to the complainant's allegation, a "Real World Situation," not a theoretical one. This assertion is valid now and will be in the future. Finally, the Department notes that, by accommodating an 18 percent loss for 64 byte packets, the RCMP has preserved its minimum requirements, while allowing 66 percent of the OEMs to propose a solution.

On the issue of the VLANs (sections 5.2.14, 5.2.17, 5.2.18, 5.4.11 and 5.4.12), the Department states that it never asked for a specific type of VLAN support and that, given the lack of a current IEEE standard for VLANs, it is prepared to accept a reasonably robust proprietary implementation from any bidder. To have specified a specific proprietary VLAN, as was requested by the complainant, would have rendered the Specification "vendor specific."

Concerning other restrictive requirements raised by the complainant in its letter of January 23, 1996, to the Tribunal, the Department submits, in part, that no optical bypass switch (section 5.2.10) is required, but rather a "standard six pin DIN connector"; that the reference to specific vendors for inter-operability requirements (section 5.2.11) is to ensure that the products offered by the bidders can effectively operate with the RCMP's existing technology; that the requirement for full RMON on wiring hubs only and not the Ethernet switches is to prevent restricting the ability of a number of vendors to bid a compliant product line (the market for Ethernet switches is not as mature as the market for wiring hubs); that the performance requirement for frames per second (section 5.3.5) reflects operational requirements now and in the future;



and that the test requirements specified in section 5.3.4 only requires bidders to provide test results from an independent testing laboratory and not necessarily from Harvard Internetworking Laboratories. In summary, the Department concludes that the Specification was developed taking into account the current networking environment and the required standards to meet the needs of the RCMP and that the complainant has not demonstrated that the requirement is a restrictive product specification rather than a functional competitive specification.

### The 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 prescribed procedures and other requirements 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 1007 of NAFTA provides that:

1. *Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.*
2. *Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:*
  - (a) *specified in terms of performance criteria rather than design or descriptive characteristics; and*
  - (b) *based on international standards, national technical regulations, recognized national standards, or building codes.*
3. *Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.*
4. *Each Party shall ensure that its entities do not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in that procurement.*

Article 504.3(b) of the AIT prohibits "the biasing of technical specifications in favour of, or against, particular goods or services ... or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter." Article 501 provides, in part, that the purpose of Chapter Five is to "establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

The Tribunal, having examined the evidence and arguments presented by both parties and considered the obligations specified in both the AIT and NAFTA, has concluded that the complaint is not valid. The Tribunal is of the view that the Department has stated its requirements and balanced these against the concerns expressed by various potential suppliers both before and after the publication of a Notice of Proposed Purchases up to bid closing. Before addressing each of the points raised in the complaint, the Tribunal wishes to express a concern that it has with a statement made by the Department in this case.

In the GIR, the Department states that more than two comments had to be received on the same subject before it would consider altering the Specification. The Tribunal wishes to point out that if a specification is unnecessarily or unfairly restrictive, it really does not matter whether one potential supplier or all potential suppliers raise a concern about the specification. The Department should recognize the error and correct it. Despite the above statement presented by the Department in its arguments, in the case at hand, the Department did appear to accommodate some of the concerns raised by only the complainant where those accommodations did not compromise the requirements in the procurement.

In its complaint and in subsequent submissions to the Tribunal, the complainant has articulated the specific concerns that it has with respect to the Specification. These concerns essentially relate to the part of the requirement pertaining to Ethernet switches, since questions relating to wiring hubs were resolved to the satisfaction of both the complainant and the Department.

With respect to the contention in the complaint that the Concentrators/Ethernet Switches Price Breakdown matrix directly corresponds to the architecture of one of the complainant's competitors, the Tribunal finds that there is no evidence to support this allegation.

With respect to the requirement for test results from an independent product testing laboratory (section 5.3.5), the complainant's argument that the test, referenced in Data Communications, July 1995, does not cover the products that it would have bid and, therefore, would not have served the Department's comparative requirements is purely hypothetical since the complainant did not submit a bid.

With respect to the questions of wire speed performance (section 5.3.2), frame loss (section 5.3.3), vendor-specific compatibility (section 5.2.11), 60,000 frames per second (section 5.3.5), optical bypass switch (section 5.2.10) and port density selection (section 5.0), the Tribunal finds that these are performance-based specifications that resulted from either current system configuration and workloads and/or anticipated future needs. Some of the performance criteria are supported using independent literature relating to the testing of the products being sought for purchase. Indeed, if one looks at the literature supplied by the complainant, it shows that at least nine vendors can meet the frame loss requirement. In the Tribunal's opinion, the Department has made every reasonable effort to keep these criteria broad so as to include as many vendors as possible without compromising its requirements. The Tribunal finds no evidence of a breach of the AIT or NAFTA in the establishment of the Specification in this manner.

With respect to VLANs (sections 5.2.14, 5.2.17, 5.2.18, 5.4.11 and 5.4.12), the Tribunal finds that this requirement is also performance-related and based on a reasonable justification by the Department. The Department, despite the lack of an industry standard in this area, did not specify a particular set of design characteristics, but was flexible on how suppliers could achieve this requirement. The Tribunal finds that the formulation of this requirement was not in violation of either the AIT or NAFTA.

Finally, with respect to the request for RMON, the Tribunal is of the opinion that the complainant's contention in this regard seems to be completely at odds with the stated reason for its complaint. The Tribunal is of the view that not requiring RMON on the switch part of the requirement does not create a barrier to competition. In fact, it enables significantly more suppliers to meet the Specification. The Tribunal, therefore, finds no violation of either the AIT or NAFTA with respect to this requirement.

**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 both Chapter Five of the AIT and Chapter Ten of NAFTA and, therefore, that the complaint is not valid. Therefore, the Tribunal's postponement of award order dated December 14, 1995, is no longer in effect.

Arthur B. Trudeau

Arthur B. Trudeau

Member