CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, December 7, 1998

File No.: PR-98-023

IN THE MATTER OF a complaint filed by Marcomm Fibre Optics Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

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.

Raynald Guay
Raynald Guay
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Date of Determination:	December 7, 1998
Tribunal Member:	Raynald Guay
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Joël J. Robichaud
Complainant:	Marcomm Fibre Optics Inc.
Government Institution:	Department of Public Works and Government Services

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STATEMENT OF REASONS

INTRODUCTION

On September 24, 1998, Marcomm Fibre Optics Inc. (Marcomm) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act) concerning the procurement (Solicitation No. 21120-8-4076/A) by the Department of Public Works and Government Services (the Department) for Correctional Service of Canada (CSC) for the design, supply, installation and testing of the Main Command and Control Post (MCCP) as part of a Perimeter Intrusion Detection System (PIDS) upgrade project for Mountain Institution,[2] Agassiz, British Columbia.

Marcomm alleged that the Department has awarded a contract to Senstar-Stellar Corporation (Senstar-Stellar), even though Marcomm was the low compliant bidder. This, Marcomm submitted, is contrary to the provisions of Articles 1015(4)(c) and (d) of the *North American Free Trade Agreement*[3] (NAFTA).[4]

Marcomm requested, as a remedy, that it be awarded the contract for this solicitation and that it be compensated for the reasonable costs incurred in pursuing this complaint. It further requested that the use of

1. R.S.C. 1985, c. 47 (4th Supp.).
2. A Canadian federal correctional institution that is under redevelopment to expand the facility and to increase the security level to the full "Medium" classification in conformity with standards established for CSC institutions. The upgrade of the facility and the increase in the security level means that more dangerous offenders will be incarcerated at Mountain Institution and that the inmate population capacity of the institution will increase substantially. As a result, upgrading of the facility's security systems, including the PIDS, is absolutely necessary for the safety and security of the public, the inmates and the personnel. The solicitation is for highly customized software and equipment installation which relates to the integration of the Perimeter Intrusion Detection System Integration Unit into the MCCP. It also involves installation of the Facility Alarm Annunciation System Integration Unit into the MCCP.
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. Marcomm's complaint erroneously referred to Article 1014 of NAFTA.

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a "Type Approval"[5] clause for the type of goods and services at issue not apply until such time as a formal "Type Approval" process has been developed and implemented in a manner that allows all potential bidders in future procurements to compete on an equal basis.

On September 29, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[6] (the Regulations) had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into the complaint. On November 2, 1998, the Department filed a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[7] On November 10, 1998, Marcomm filed its comments on the GIR with the Tribunal.

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 the record.

PROCUREMENT PROCESS

A Notice of Proposed Procurement for the requirement was posted on Canada's Electronic Tendering Service (MERX) and was advertised in *Government Business Opportunities*. The requirement was identified as being covered, amongst other things, by NAFTA.

The Request for Proposal (RFP) for this procurement included, in part, the following:

> **4. DEVIATION TO APPLICABLE DOCUMENTS**
>
> All references to "Type Approval" in the applicable documents - Statement of Work, Specifications and Standards - listed in the Statement of Technical Requirements do not apply to this requirement.

Article 32.3 of the RFP, "Technical Proposal," requires the bidder to describe, in detail, in its technical response how it proposes to meet the requirements of the specifications, more particularly, those areas in the Statement of Technical Requirements (STR) and the evaluation criteria at Appendix "C" to the RFP where specific information is required. Article 33, "Proposal Evaluation," indicates that the evaluation of a proposal will be based solely upon the contents of the submission. The Department, however, may, at its discretion, request clarification in writing. Article 35 requires bidders to participate in a site visit and bidders' conference to be held on July 7, 1998.

Section 1.2 of the STR describes the specific work to be performed by the contractor and indicates that the STR will be read in conjunction with the applicable specifications listed at section 2.1.1 of the STR. Section 4.2.2 provides, in part, that the contractor will customize, in accordance with the requirements

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5. Defines a process whereby products are submitted to an extensive formal testing and evaluation program to ensure adherence to CSC equipment standards and/or suitability to CSC operational environment. At the time of the issuance of the solicitation, CSC did not have a formal "Type Approval" process in existence for the goods and services being procured.
6. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
7. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

identified in specification ES/SPEC-0005.[8] Section 3.2.3 of specification ES/SPEC-0005 provides, in part, that "[t]he MCCP Integration Console shall be configured in a fully redundant[9] hardware and software configuration and consist of two (2) controllers and two (2) interactive peripheral [video display units], capable of sustaining a complete controller failure without affecting the operation of either PIDS, th[e] [Facility Alarm Annunciation System], or any other integrated system."

Appendix "C" to the RFP, "Bid Evaluation Criteria," indicates under section A.1 that compliance with technical specifications is mandatory. During the bidders' conference and site visit, the Department and CSC, after informing the attendees that the "Type Approval" requirement was waived for this solicitation, advised that clarification would be included in the minutes of the site visit and bidders' conference, forming part of the RFP with respect to this mandatory requirement. The minutes distributed to all attendees on July 16, 1998, include, in part, the following:

> **TYPE APPROVAL:**
>
> The following has been discussed and agreed to by … CSC and [the Department].
>
> Amend the Type Approval clause as follows;
>
> Since [CSC] has not yet finalized a "Type Approval" equipment list, the requirement for type approval will be waived. The Crown, however, reserves the right to accept or reject a system or equipment based on the following criteria;
>
> a. The system or equipment must be proven to work in an operational environment similar to that of a Canadian Federal Correctional Institution.
>
> b. The Crown is privy to information that indicates the non-performance of the proposed system or equipment in similar applications; or consultation with other professionals in the security industry reveal major deficiencies with the proposed system or equipment.

Amendment No. 002 to the RFP dated July 20, 1998, also includes the above-mentioned wording.

Three proposals were received in response to this solicitation by August 5, 1998, including one each from Marcomm and Senstar-Stellar. On August 7, 1998, the three technical proposals were delivered to the CSC technical authority for evaluation.

On August 25, 1998, CSC informed the Department, amongst other things, that Marcomm's proposal was found to be non-compliant because the PIDS Integration Unit (PIU) system that it proposed had not been demonstrated to work in an operational environment similar to that of a Canadian federal correctional institution.

On September 9, 1998, the Department wrote to CSC requesting additional information in support of CSC's decision to disqualify Marcomm's proposal. By letter dated September 14, 1998, CSC responded, in part, as follows:

> Please note that, with due **recognition to safety and security** of the inmates, staff and also for the general public at large, it is **absolutely essential** that we provide a **perimeter security surveillance**

8. Electronics engineering specification for electronic systems integration into the main communications and control post in federal correctional institutions.

9. The capability to handle all of the functions of another processor in case of malfunction or failure.

> **system**, analogous to that of a Canadian Federal Correctional Institution **holding incarcerated individuals**. Consequently, the aforementioned "similarity" cannot be to that of a commercial/industrial, or other public facility (eg. Senate of Canada).
>
> Please note that the PIDS Integration Unit (PIU) is the hardcore nucleus of the PIDS operation system. Consequently, for personal safety and reliability reasons, we consider it improper to place an unproven PIU system into operation at a federal Correctional Institution, until the system has been fully tested and/or demonstrated to meet type approval equivalence.

On September 16, 1998, a contract was awarded to Senstar-Stellar, the firm having submitted the only proposal deemed compliant by CSC.

VALIDITY OF THE COMPLAINT

Marcomm's Position

Marcomm submitted that the interpretation described in the GIR is not the requirement included in amendment No. 002 to the RFP. Marcomm further submitted that it was not its intention to provide references to the proposed equipment as a system equivalent to an integration unit, but rather to provide references which show that the proposed equipment has been proven to work in an operational environment similar to that of a Canadian federal correctional institution as required under clause 4 a) of amendment No. 002.

Concerning Marcomm's assertion that a system or equipment found compliant with the STR, CSC standards, functional specifications and the requirements of the additional evaluation criteria would be deemed fully compliant, Marcomm conceded that this may not be the exact wording used by the Department during the site visit discussions. Marcomm, however, is of the view that this had to be the Department's intent in the circumstances because, to date, only one manufacturer's software had been installed in a CSC facility for use as part of a PIU system and because the restrictive interpretation of amendment No. 002 to the RFP now proposed by the Department would amount to sole sourcing.

For the above reasons, Marcomm reiterated that its response to the solicitation is fully compliant to the specific evaluation criteria set forth in the RFP.

Department's Position

The Department submitted that it correctly evaluated Marcomm's proposal based on the information provided and was fair in its application of the evaluation and selection criteria as set out in the RFP. The onus, the Department submitted, is on the bidder to provide sufficient information in the proposal for evaluation purposes. The CSC has interpreted amendment No. 002 to the RFP relating to "Type Approval" to mean that: (1) the proposed system or equipment must have been tested in an environment in which the security requirements are very high (such as a correctional institution or a psychiatric facility housing dangerous patients), involving multiple levels and types of security and alarm systems; and (2) the system or equipment referenced as having been tested in a similar operational environment must be a system involving a PIU. The Department submitted that Marcomm is seeking to have the Tribunal substitute Marcomm's interpretation for that of CSC and would have CSC risk compromising the safety and security of the public, the personnel and the inmates.

The Department submitted that the likelihood of volatility and concurrent events triggering different alarms simultaneously within the interior and perimeter security systems of a federal correctional institution makes comparison with a secure government facility, such as the Senate, of limited practical use. Consequently, the requirement of clause 4 a) of amendment No. 2 to the RFP necessarily means that the proposed system or equipment must have been tested in an environment in which the security requirements are very high (such as a correctional institution or a psychiatric facility housing dangerous patients), involving multiple levels and types of security and alarm systems and that the system or equipment proposed must be a system involving a PIU.

In this regard, the Department submitted that the systems proposed by Marcomm did not satisfy these requirements because: (1) the Dynatrol System installed at Drumheller Institution comprises the "hot standby" system that does not process alarms and is not designed to handle, integrate and prioritize multi-functional alarms; (2) the Dynatrol System at Fenbrook Institution is a single processor system with none of the redundancy capability required for the PIU and cannot be considered an integration unit; (3) the Dynatrol System installed at the Senate does not provide the same level of redundancy as that required of an integration unit at a Canadian federal correctional institution, and the Senate is not a highly secure environment in which dangerous individuals are being managed or in which there is a likelihood of volatility and concurrent events triggering different alarms simultaneously; and (4) the Dynatrol System at Dorchester Penitentiary was in the installation stage at the time of bidding and, therefore, could not be evaluated as a system or equipment which had been "proven to work" in an operational environment similar to that of a Canadian federal correctional institution, and the system is not designed and configured with a dual processing capability and redundancy as required.

Finally, the Department submitted that there was no discussion on July 7, 1998, to the effect that "equipment which had not to date been installed in a CSC PIU System configuration but was compliant with the STR, CSC Standards and Functional specifications" would be acceptable and automatically deemed fully compliant under the evaluation criteria that replaced the "Type Approval" clause and that no questions were raised by bidders on this point during the bidding period.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was concluded in accordance with the requirements set out in NAFTA.

Articles 1015(4)(a), (c) and (d) of NAFTA provide that an entity shall award contracts in accordance with the following:

> (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;
>
> (c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most

> advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;
>
> (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

The Tribunal must determine whether the Department acted in accordance with the above-mentioned provisions when it found Marcomm's proposal to be non-compliant because the PIU that it proposed had not been demonstrated to work in an operational environment similar to that of a Canadian federal correctional institution and when it awarded a contract for this requirement to Senstar-Stellar.

It is clear from the evidence that, for the purposes of this solicitation, the "Type Approval" clause had been waived by the Department and replaced, in part, by the following:

> The Crown, however, reserves the right to accept or reject a system or equipment based on the following criteria;
>
> a. The system or equipment must be proven to work in an operational environment similar to that of a Canadian Federal Correctional Institution.

It is also clear that the above requirement is a mandatory and essential requirement of the RFP and that failing to meet this requirement alone is sufficient to make a proposal non-compliant.

Marcomm submitted that its offer is compliant, in that the equipment that it proposed met all CSC standards and operational specifications. This was evidenced by the fact that no deviation from the applicable standard was cited by the Department in its letter of September 17, 1998, documenting the reasons why Marcomm's proposal was declared non-compliant and by the fact that the equipment that it proposed had been demonstrated to work in several federal government correctional institutions, as well as in the Senate, an environment, in Marcomm's opinion, although not similar physically to a correctional institution, nevertheless, similar operationally.

The Tribunal observes that the GIR extensively documents Marcomm's failure to offer a system that provides "full redundancy," a mandatory requirement of mandatory specification ES/SPEC-0005. The Tribunal, however, also observes that Marcomm is correct in stating that the Department's letter of September 17, 1998, is substantially based on Marcomm's failure to document, in its proposal, a proven system or equipment in an operational environment similar to that of a Canadian federal correctional institution. The Tribunal also notes that Marcomm did not comment at all on the redundancy issue in its observations on the GIR. In determining this matter, however, the Tribunal will decide, first and foremost, whether the Department acted reasonably in determining that the Senate does not constitute an operational environment similar to that of a Canadian federal correctional institution within the meaning of clause 4 a) of amendment No. 002 to the RFP.

The Tribunal is satisfied that clause 4 a) of amendment No. 002 to the RFP clearly requires that the proposed system or equipment be proven to work in an environment primarily designed to hold incarcerated individuals, be they inmates or, as the Department suggests, dangerous psychiatric patients or other similar individuals. The Tribunal is satisfied that such an interpretation is a reasonable characterization of the word "similar" in the circumstances. The Tribunal is also satisfied that it was reasonable to conclude, as the Department and CSC did, that Marcomm's proposal had not demonstrated that the proposed system or equipment was proven to work in an operational environment similar to that of a Canadian federal

correctional institution. Consequently, the Tribunal determines that the Department and CSC acted in accordance with the provisions of Article 1015(4)(a) of NAFTA in declaring Marcomm's proposal non-compliant.

The Tribunal is of the view that it was possible for bidders to document, in their proposals, a proven system or equipment in an operational environment other than a Canadian federal correctional institution, the primary purpose of which was to contain dangerous individuals and, as such, the Tribunal is satisfied that the Department's requirement for demonstration in an operational environment similar to that of a Canadian federal correctional institution was not a sole source requirement in disguise.

Finally, the Tribunal is of the view that a "Type Approval" clause should be used in those instances where a formal "Type Approval" process exists which allows potential bidders to compete on an equal basis.

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 in accordance to the requirements set out in NAFTA and that, therefore, the complaint is not valid.

Raynald Guay
Raynald Guay
Member