

Ottawa, Tuesday, July 29, 1997

File No.: PR-97-006

IN THE MATTER OF a complaint filed by Northern Micro 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 valid.

The Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services consider Northern Micro Inc.'s compliant offer as that of the third bidder and proceed in accordance with the provisions of the *North American Free Trade Agreement*, the *Agreement on Government Procurement*, the *Agreement on Internal Trade* and the Request for Standing Offer.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Northern Micro Inc. its reasonable costs incurred in relation to filing and proceeding with its complaint.

Charles A. Gracey

Charles A. Gracey
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: July 29, 1997

Tribunal Member: Charles A. Gracey

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Hugh J. Cheetham

Complainant: Northern Micro Inc.

Intervener: SHL Computer Innovations

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

BACKGROUND

On April 30, 1997, Northern Micro Inc. (Northern) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) for the supply of computer workstations by means of National Individual Standing Offers² (NISOs) for Human Resources and Development Canada (HRDC) (Solicitation No. V9330-5-0035/A).

Northern alleged that the Department's determination that a single business entity can represent more than one bidder is insupportable in the circumstances. Therefore, in accordance with the provisions of section 3.0, Part III, of the Request for Standing Offer (RFSO), Northern submitted that now that its offer has been established by the Department as the fourth lowest offer, and considering that two of the three lowest offers have been submitted by the same bidder, Northern is the third ranking business entity and, as such, it should be issued a NISO as is the preference of HDRC.

Northern requested, as a remedy, that it be awarded a NISO in respect of the RFSO. In the alternative, it requested that the three NISOs awarded pursuant to this solicitation be terminated and that a new solicitation be issued, and that it be reimbursed the costs that it incurred in preparing its bid and in preparing, filing and prosecuting this complaint, including its legal costs.

INQUIRY

On May 1, 1997, 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*³ (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry. On May 27, 1997, the Department filed with the Tribunal a Government Institution Report (GIR) in

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

2. A standing offer allows the Crown to purchase frequently ordered commercially and non commercially available goods and/or services directly, from a supplier at prearranged prices, under set terms and conditions, when and if these are requested. A NISO is a particular type of standing offer for the use of a specific user throughout Canada.

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

accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On May 28, 1997, the Tribunal granted SHL Computer Innovations Inc. (SHL) leave to intervene in this matter. On June 5, 1997, Northern 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 (NPP) and RFSO for this requirement, dated July 8, 1996, with a closing date of September 4, 1996, was produced by the Department. The NPP identified the requirement as being covered by the *North American Free Trade Agreement*⁵ (NAFTA), the *Agreement on Government Procurement*⁶ (the AGP) and the *Agreement on Internal Trade*⁷ (the AIT).

During the tendering period, the Department issued nine amendments in the form of updates. Update No. 004, dated September 18, 1996, increased the maximum number of standing offers that could be awarded under the RFSO from two to three. According to the GIR, the Department felt that a third platform could potentially provide a "buffer" in the event that technical problems were experienced with a particular type of system, as there would still be price competition among the remaining two systems.

Subsection 1.1, Part II of the RFSO reads:

If an alternate offer is submitted, care should be taken to ensure that such offer is in a PHYSICALLY SEPARATE document, clearly marked as an alternate offer and follows the format specified herein. Alternate offers will be evaluated independently with no reference to any other offers.

Section 3.0, Part III, of the RFSO included, in part, the following:

3.0 BASIS OF SELECTION:

A maximum of two (2) Bidders will be awarded a National Individual Standing Offer(s) (NISOs) subject to the following:

- 3.1 Offers will be evaluated based on lowest aggregate cost and compliancy to the following evaluation criteria.

Update No. 004 modified section 3.0 as follows:

A maximum of three (3) Bidders will be awarded a National Standing Offer (NISO) subject to the following.

A total of 19 offers were submitted by 8 suppliers. During the period from October 1996 to February 1997, the offers were evaluated by the Department. In early February 1997, when the benchmark

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

5. 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).

6. As signed in Marrakech on April 15, 1994 (in force for Canada on January 1, 1996).

7. As signed at Ottawa, Ontario, on July 18, 1994.

testing commenced, Northern was advised that two of the three offers that it had submitted had been found non-compliant. At the completion of the evaluation process, 5 of the 19 offers submitted were found compliant and were ranked from lowest to highest aggregate cost, as follows:

- (1) Mind Computer Products (one of three offers submitted by Mind, offering Mind products);
- (2) SHL Computer Innovations (“SHL” one of three offers submitted by SHL, offering AST products);
- (3) SHL Computer Innovations (one of three offers submitted by SHL, offering Hewlett Packard products);
- (4) Northern Micro Inc. (one of three offers submitted by Northern, offering IBM products); and
- (5) Cemtech Limited (one of three offers submitted by Cemtech, offering Hewlett Packard products).

On March 17, 1997, the Department received a letter from Northern inquiring if it was still being considered a potential supplier. A reply was sent to Northern on March 20, 1997. The letter states, in part:

The procedures described in the Request for Standing Offer (RFSO) was to award a NISO to a maximum of three (3) Bidders based on the lowest aggregate cost and compliancy.

The result of the evaluation indicates that your offer is fully compliant and is ranked the fourth lower cost, compliant bid.

Using the above mentioned procedures, three (3) NISOs will be awarded to the three (3) lowest Bidders.

Standing offers in the amount of \$10,000,000 each were issued on March 27, 1997: one to Mind Computer Products (Mind); and two to SHL in respect of its AST product offer and in respect of its Hewlett Packard product offer.

On March 27, 1997, the Department received a letter from Northern’s legal representative questioning the Department’s interpretation of the Basis of Selection, section 3.0, Part III, of the RFSO. On April 16, 1997, the Department answered Northern’s legal representative indicating that it was satisfied that its interpretation of the term “bidder” was correct in the context of the procurement. It further indicated that the Department was under no obligation to award three, or any standing offers under the RFSO process and that, in fact, three standing offers had been awarded in accordance with the evaluation criteria set out in the RFSO.

VALIDITY OF THE COMPLAINT

Northern’s Position

In its comments on the GIR, Northern submits that contrary to section 3.0, Part III, of the RFSO, titled “BASIS OF SELECTION,” one bidder was awarded two NISOs.

Northern submits that there is no support in the RFSO for the Department’s position that a single business entity can represent more than one bidder as this term is used in section 3.0, Part III, of the RFSO. It further submits that, if the Department intended that the submission of two offers from a single business

entity could qualify that entity as two bidders under section 3.0, then this intent should have been stated expressly and unambiguously in section 3.0. According to Northern, nothing in subsection 1.1, Part II, of the RFSO suggests that a single business entity could represent more than one bidder under the RFSO. Indeed, if an initial offer and an alternate offer were submitted by the same business entity, Northern submits that this would amount to two offers being submitted by the same bidder.

Northern also states that it is not convinced, as the Department appears to be, that the fact that alternate offers are to be evaluated independently, with no reference to any other offers, means that a single business entity that submits more than one offer is to be automatically considered a separate bidder for each submitted offer. Nothing in subsection 1.1, Part II, of the RFSO suggest such a conclusion.

Northern states that it understands clearly that the Department could have awarded a NISO to one, two or three bidders. However, Northern submits that one bidder was awarded two NISOs while section 3.0, Part III, of the RFSO unambiguously indicates that each bidder to whom the Department decides to award a NISO will be awarded a single NISO. A bidder cannot be awarded multiple NISOs unless one accepts the Department's apparent position that a single business entity can represent more than one bidder.

Department's Position

In its comments on the complaint, the Department submits that it has treated all suppliers equally and that it was fair in its application of the evaluation and selection terms of the RFSO. It states that Northern was properly denied a NISO.

The Department states that it is its understanding that Northern does not dispute the Department's determination that the two other offers submitted by Northern were non-compliant. Nor does Northern take issue with the ranking of its compliant offer as fourth. Consequently, the Department submits that the only issue is whether it was obliged to award a NISO to Northern, based on the selection criteria set out in the RFSO. In this respect, the Department submits that section 3.0, Part III, of the RFSO, as amended, set out a maximum of three bidders, not a minimum or exact number. Therefore, the Department was at liberty to award any number of NISOs from one on up, as long as the number of bidders awarded NISOs did not exceed three. The Department further submits that the RFSO wording limited the issuance of NISOs to no more than three bidders, but did not restrict it from awarding NISOs to fewer than three bidders. Therefore, whether or not SHL is considered one bidder, the Department was under no obligation to award another NISO.

In responding to Northern's suggestion that the Department could have awarded a single standing offer to SHL for both of its compliant offers, the Department points out that the RFSO indicated that alternate offers would be evaluated independently and, consequently, it was right in awarding SHL two separate standing offers.

In sum, the Department states that Northern submitted the fourth lowest cost compliant offer. NISOs were awarded to two bidders, for the three lowest cost, compliant offers, each of which was evaluated independently with no reference to any other offers. This is consistent with the selection criteria stated in advance, that a maximum of three bidders would be awarded NISOs. Northern, the Department concludes, has not substantiated that it should have been issued a NISO.

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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in NAFTA, the AIT and the AGP.

Article 1015(4)(d) of NAFTA and Article XIII(4)(c) of the AGP both provide that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation. In this instance, the Tribunal must decide whether or not the Department conformed to the above mentioned provisions when it issued one NISO to Mind and two NISOs to SHL. The issue has to do with the meaning to be given to section 3.0, Part III, of the RFSO which states, in part, that “[a] maximum of three (3) Bidders will be awarded a National Standing Order (NISO).”

The Tribunal is of the view that, under section 3.0, Part III, of the RFSO, a single bidder is not transformed into multiple bidders simply by virtue of having submitted more than one bid as was suggested by the Department. Such a construction of the word “[b]idder” flies in the face of both logic and plain English and, as such, is untenable. Moreover, contrary to the Department’s suggestion, such an interpretation cannot be implied or derived from subsection 1.1, Part II, of the RFSO. All that subsection 1.1 means is that alternate offers will be evaluated independently as different offers, but not that those alternate offers will be considered to be submitted by different bidders.

The Tribunal is also of the opinion that the indefinite article “[a]” in section 3.0, Part III, of the RFSO means one. Indeed, the manner to express the plural in a construction such as the one under consideration is to add an (s) after the expression “a National Standing Offer.” This is what the Department did in drafting the original text of section 3.0. However, section 3.0, as amended, no longer expresses the plural and, in the opinion of the Tribunal, it must be interpreted accordingly. Therefore, the Tribunal determines that, in conformity with section 3.0, the Department was authorized to issue one NISO each to a maximum of three different bidders. However, the Department, satisfied that its interpretation of the word “[b]idder” was correct in the circumstances, issued two NISOs to SHL. This contravenes the award rule set out in section 3.0 and, on this basis, the Tribunal determines that the complaint is valid.

The Tribunal recognizes that the award rule in section 3.0, Part III, of the RFSO allowed the Department to award one standing offer to each of one, two or three different bidders. The Tribunal is also satisfied that it is clear, in this case, that the Department intended to award three NISOs as it amended section 3.0, increasing the maximum number of bidders from two to three to secure three platforms. The Tribunal will not decide whether or not a NISO may or may not cover more than one offer as it is suggested by Northern. However, based on the Tribunal’s construction of section 3.0, Northern was the third lowest bidder for purposes of section 3.0. If, as it appears, the Department decided to award three NISOs, Northern should have been considered for the third NISO. On that basis, the Tribunal recommends that the Department consider Northern’s compliant offer as that of the third bidder and proceed in accordance with the provisions of the applicable agreements and of the RFSO.

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 not conducted in accordance with the applicable agreements and that, therefore, the complaint is valid.

The Tribunal recommends that the Department consider Northern's compliant offer on the above mentioned basis and proceed in accordance with the provisions of the applicable agreements and of the RFSO.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Northern its reasonable costs incurred in relation to filing and proceeding with its complaint.

Charles A. Gracey _____

Charles A. Gracey

Member