

Ottawa, Monday, July 12, 1999

File No.: PR-99-002

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 not valid.

Richard Lafontaine

Richard Lafontaine

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: July 12, 1999

Tribunal Member: Richard Lafontaine

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Gilles B. Legault

Complainant: Northern Micro Inc.

Counsel for the Complainant: E. Lindsay Gorrell

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

COMPLAINT

On April 12, 1999, Northern Micro Inc. (Northern Micro) 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. 595EJ.46577-8-1628/A) by the Department of Public Works and Government Services (the Department), under National Master Standing Offer² (NMSO) No. E60EJ-7-0004/OXX/EJ, for the supply, delivery and configuration of 900 NMSO Category 2.1 Advanced Pentium II desktop microcomputers,³ with an option to purchase up to 450 additional systems, for the Department of National Revenue (Revenue Canada).

Northern Micro alleged that the Department acted contrary to the provisions of the *North American Free Trade Agreement*⁴ (NAFTA) and the *Agreement on Internal Trade*⁵ (the AIT) by declaring, after Northern Micro was awarded the contract, that its offer was non-compliant for failing to meet a mandatory requirement of the technical specifications and, on this basis, by terminating its purchase order to Northern Micro.

Northern Micro requested, as a remedy, that it be awarded the contract. In the alternative, if the Request for Volume Discount⁶ (RVD) is re-issued by the Department, Northern Micro requested that no contract be awarded under the re-issued RVD until the validity of the complaint is determined by the

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1. R.S.C. 1985, c. 47 (4th Supp.).
 2. An offer for the use of several identified users throughout Canada from potential suppliers which allows the federal government to purchase frequently ordered commercially and non-commercially available goods and/or services directly from firms at prearranged prices, under set terms and conditions when and if these are required. A contract is formed at the time at which a call-up against the standing offer is made.
 3. According to the Government Institution Report, the NMSO for microcomputers set out procedures allowing all potential suppliers that met the selection criteria and that had been issued an NMSO to respond to a Request for Volume Discount.
 4. 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).
 5. As signed at Ottawa, Ontario, on July 18, 1994.
 6. A procedure that permits all potential suppliers with a system in the required category of the NMSO to submit final bids based on the modified quantities and requirements of a specific customer, in this case, Revenue Canada.

Tribunal. Northern Micro also requested its costs incurred in preparing its bid and in preparing, filing and proceeding with the complaint.

On April 15, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁷ (the Regulations). That same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. On April 26, 1999, the Department wrote to the Tribunal certifying that the solicitation was urgent and that any delay in awarding the contract would be contrary to the public interest. Accordingly, on May 3, 1999, the Tribunal rescinded its postponement of award order of April 26, 1999. On May 18, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁸ On May 28, 1999, Northern Micro 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

On February 23, 1999, the Department received a requisition from Revenue Canada for the above-noted microcomputers. As a result, on March 5, 1999, the Department issued an RVD to the eight offerors with systems that qualified in Category 2.1 of the NMSO as of that date. The RVD closed on March 12, 1999.

The RVD, under paragraph 1 of the section entitled "Bidder's Proposal", reads, in part: "All items listed in Appendix A must be bid in order for a Proposal to be considered". The list of deliverables set out in Appendix A includes, next to item 04, "Optional 17" Monitor as per Appendix C". Appendix C, entitled "Monitor Specifications", contains, in part, the following requirements:

All monitors requested must meet or exceed the following mandatory requirements:

For 17" monitors:

- have integrated speakers.

The RVD, under paragraph 7 of the section entitled "Evaluation", reads:

Compliant proposals will be evaluated based on the **lowest aggregate cost**, including options and desirable features, after applying all appropriate adjustments for desirable features and the reduction percentages derived from the NSTL/SIPSS benchmark (to item 01). Proposals will be evaluated based on a purchase quantity of 900 systems, including options, and an optional purchase quantity of 450 systems, including options.

Six offerors submitted responses to the RVD.

On March 16, 1999, the bid responses were tabulated by the Department. Northern Micro's bid response, which indicated that it was compliant with all requirements, was determined to have the lowest evaluated cost. Accordingly, on March 18, 1999, a contract was awarded to Northern Micro.

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

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

According to the GIR, on March 19, 1999, Revenue Canada informed the Department that the 17 in. ADI 5GT monitor proposed by Northern Micro was non-compliant, as it did not have integrated speakers. That same day, the Department requested, by facsimile, that Northern Micro confirm whether the 17 in. monitor specified in its response met the mandatory requirement that the 17 in. monitor have integrated speakers. The Department contacted Northern Micro by telephone to ensure that the facsimile had been received. During the conversation, Northern Micro requested a meeting with the Department, which was held later on that same day.

At the meeting, Northern Micro presented the Department with a letter dated March 19, 1999, which reads as follows:

With regard to the above contract, Northern Micro would like to make a proposal to substitute our 17" monitor. We [would] like to substitute the 17" monitor from ADI 5GT to Philips 107 MP "Brilliance Multi Media monitor" with [built-in] integrated speakers and which meet[s] all the specification[s] for the above contract, (Specification attached). The unit price will remain the same as our bid submission. Please kindly accept this letter as [our] product substitution request.

According to the GIR, the Department indicated that it could not accept this alternative because the initial monitor specified by Northern Micro in its bid response was non-compliant. The GIR states that Northern Micro then requested that the Department accept the monitor that had been offered, with the understanding that Northern Micro would be providing, at its cost, good quality speakers with each monitor. The Department again indicated that this alternative was unacceptable, since the speakers now offered clearly did not form part of Northern Micro's bid response. According to the GIR, at the insistence of Northern Micro, the Department accepted to refer the matter of compliance with the RVD requirement to the Department's technical advisors, but indicated that, since the proposed alternative had not been offered in Northern Micro's bid response, the Department would not change its decision.

Following the meeting, Northern Micro sent the Department, by facsimile, two letters dated March 19, 1999. One letter was a copy of the letter referenced earlier. The second letter indicated, among other things, that the 17 in. monitor specified in Northern Micro's bid response "comes with a pair of Labtec LCS-1224 3D sound Speakers".

On March 25, 1999, the Department advised Northern Micro that it had re-examined the bid response and could not find any indication that it included speakers. Accordingly, the Department informed Northern Micro that, with its agreement, the contract would be terminated by mutual consent or, failing that, terminated for default.

On March 26, 1999, Northern Micro informed the Department that it did not agree to the termination of the contract. On March 29, 1999, the Department informed Northern Micro that the contract would be terminated. On March 30, 1999, the Department informed Revenue Canada and Northern Micro that the requirement would be re-tendered because, at that late date, no other offeror could meet the mandatory delivery requirements.

VALIDITY OF THE COMPLAINT

Department's Position

The Department submitted that the Tribunal has no jurisdiction over a claim for wrongful termination of contract. Northern Micro's course of action, the Department argued, arises out of the alleged wrongful termination of a legally enforceable contract entered into between the parties and is founded on the enforcement of rights and obligations in contractual law. Accordingly, the Department submitted that the issue of whether the Department acted properly in terminating the contract for default is not properly the subject of procurement review, pursuant to the provisions of subsection 30.11(1) of the CITT Act and the Regulations. The Department submitted that, in the particular circumstances of this complaint, the procurement process in relation to the designated contract was completed upon the award of a legally enforceable contract to Northern Micro on March 18, 1999.

Subject to the above and in the alternative, the Department submitted that the issue underlying the termination of the contract for default is whether, in fact, the provision of integrated speakers formed part of Northern Micro's bid response.

The Department asserted that it correctly determined that the ADI 5GT monitor specified in Northern Micro's bid response was not equipped with integrated speakers and that Northern Micro's bid response identified all deliverables included in its bid response by make and model number, with the notable exception of speakers.

The Department argued that speakers were clearly not specified in Northern Micro's bid response. This fact, the Department submitted, is corroborated by Northern Micro's admission at the meeting of March 19, 1999, that it overlooked, in error, the requirement for integrated speakers, by its subsequent offer to rectify the situation and by the fact that the ADI 5GT monitor does not have integrated speakers.

The Department submitted that, even if it had established, prior to contract award, that the ADI 5GT monitor did not meet the mandatory requirement of the RVD, the Department could not have permitted Northern Micro to add speakers to its bid response through a "clarification" process, as this solution would have constituted new information not contained in Northern Micro's bid response and, therefore, would have been an impermissible bid repair.

With respect to the term "integrated speakers", the Department submitted that the accepted interpretation of the term contemplates a monitor with speakers physically located inside the monitor case. All speaker controls would be accessible through the monitor's on-screen menu, and there would be a common switch and cable. This interpretation, the Department submitted, best exemplifies the common dictionary meaning of "integrate", which is to incorporate into a larger unit or to form or blend into a whole.

Another less generally accepted meaning of integrated speakers, the Department noted, is a monitor and external speaker combination in which both components have been specifically engineered to fit together and do not require any additional parts or modifications to their cases. According to the Department, the ADI 5GT monitor offered by Northern Micro cannot be said to meet this interpretation. However, the Department further noted that several other ADI monitors do offer optional speakers.

In any event, the Department submitted that the ADI 5GT monitor offered by Northern Micro does not meet either interpretation. Evidence from the manufacturer's Web site does not describe the ADI 5GT monitor as having either "built-in" or "optional" speakers. Rather, the specification for the ADI 5GT monitor clearly indicates "Speakers: N/A". The Department added that Northern Micro itself, in its response to the "Features Survey" to the National Software Testing Laboratories, the independent third party contracted to conduct the benchmark testing for the microcomputer system offered by Northern Micro, indicated that the ADI 5GT monitor did not have integrated speakers.

With respect to Northern Micro's argument that the delivery of a separate box of speakers and additional parts, such as brackets, to modify the monitor's case for the mounting of the speakers satisfies the requirement that a 17 in. monitor have integrated speakers, the Department submitted that, not only is this argument untenable, but that there was nothing in Northern Micro's bid response to suggest that the monitor would be brought together with speakers to fit into a complete system. There was no mention of external Labtec speakers in the bid response nor any indication that integration or installation work would be performed.

The Department requested the opportunity to make further submissions with respect to the award of costs in this matter.

Northern Micro's Position

With respect to the jurisdiction issue, Northern Micro submitted that this submission by the Department is without foundation. It is abundantly clear that the complaint that it filed concentrates almost entirely on the bid evaluation procedure.

With respect to the Department's arguments that Northern Micro's proposal was not compliant for failing to offer monitors with "integrated speakers", Northern Micro submitted that the "Features Survey" referred to by the Department was for a purpose other than the solicitation in dispute and that the ADI 5GT monitor proposed in response to the "Features Survey" satisfies the minimum requirements of the NMSO. Northern Micro added that the RVD mandated a number of changes to the requirements for the desktop computers, as specified in the NMSO, one of which was for an optional 17 in. monitor with integrated speakers. In addition, Northern Micro submitted that nowhere in the RVD were bidders required to describe the sub-components comprising each component of the desktop computer system, the integration of the 17 in. monitor and speakers or the make or model of the speakers. Northern Micro submitted that it is a bidder's responsibility to bid a system meeting the requirements set out in the RVD.

Furthermore, Northern Micro submitted that it was its intention, as a system integrator, to supply a set of Labtec LCS-1224 3D sound speakers with each optional ADI 5GT monitor. The speakers would be electronically connected with the sound card of the computer and physically connected to the computers.

Northern Micro submitted that it specified the ADI 5GT monitor with the complete knowledge of the monitor's specifications and of the fact that it does not have integrated stereo speakers, and argued that it was fully justified in bidding the monitor as compliant. Northern Micro submitted that it was not required to specify how it would change the monitor, or integrate it with other equipment, to comply with the RVD requirements. Furthermore, Northern Micro submitted that it is apparent from the GIR that the Department did not have a clear definition of the term "integrated speakers" when the RVD was issued. Thus, Northern Micro submitted, each bidder was within its right to interpret the term in keeping with industry standards. The Department's apparent interpretation, i.e. speakers that are housed within the monitor case or attachable

speakers that are specifically designed for the monitor case, is narrower than Northern Micro's interpretation, which also encompasses the use of Labtec or other speakers that are designed for different monitors that do not come with internally housed speakers. This latter definition, Northern Micro observed, is in keeping with Northern Micro's expertise and experience in the industry as a system integrator.

With respect to Northern Micro's alleged declaration during the March 19, 1999, meeting with the Department, Northern Micro denies that it made remarks to the effect that it had, in error, overlooked the requirement for integrated speakers. It submitted that its offer to substitute another monitor was an attempt to assist in resolving the situation expeditiously to the benefit of both sides.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of an 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, *inter alia*, in accordance with the requirements in NAFTA and the AIT.

The Tribunal will first address the Department's submission that the Tribunal has no jurisdiction in the matter because the procurement process in relation to the designated contract was completed upon the award of a legally enforceable contract to Northern Micro on March 18, 1999.

Subsection 30.11(1) of the CITT Act states, among other things, that a potential supplier may file a complaint with the Tribunal concerning any aspect of the "procurement process" that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Basically, the expression "procurement process" in the relevant provisions of the applicable trade agreements, namely, Article 1017(1)(a) of NAFTA and Article 514(2)(a) of the AIT, refers to the beginning of the procurement requirement by an entity through to the contract award.

In the Tribunal's opinion, the evaluation of bids and the award of contracts are clearly aspects of the procurement process. That the alleged irregularities in relation thereto are discovered after the contract award does not affect the Tribunal's jurisdiction to receive, inquire into and decide such complaints. On the contrary, it is quite common for the Tribunal to receive complaints only after a contract has been awarded, admittedly from a complainant other than the contract awardee, as is the case here. However, in the Tribunal's view, the mere fact that the awardee is the complainant changes nothing in its jurisdiction.

In this matter, the Tribunal must determine whether the Department acted in compliance with the obligations set forth in the relevant provisions of the applicable trade agreements when it determined that Northern Micro's bid response did not meet, at the time of bid opening, all the mandatory requirements of the RVD, specifically the requirement to include integrated speakers. This falls squarely within the procurement process over which the Tribunal has jurisdiction, as would be the case if another potential supplier had complained to the Tribunal with respect to the award of the contract to the awardee, arguing that the awardee's bid did not meet all the mandatory requirements of the RVD.

With respect to the merits of this complaint, the Tribunal notes that Article 506(6) of the AIT provides, in part, that "[t]he tender documents shall clearly identify the requirements of the procurement, the

criteria that will be used in the evaluation of bids and the method of weighting and evaluating the criteria". Article 1015(4)(a) of NAFTA provides that, "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".

It is worth noting that, in the tender documentation, item 04 of Appendix C to the RVD clearly requires that the proposed 17 in. monitors have integrated speakers. It is also clearly stated in paragraph 1 of the RVD that bidders must quote firm unit prices for all the deliverables specified in order for their bid responses to be considered. This is not in dispute. What is in dispute is whether, at the time of bid opening, Northern Micro's proposal met the mandatory requirement regarding the included integrated speakers.

In this respect, the parties agree that Northern Micro offered, in its bid response, ADI 5GT monitors and that these monitors do not have integrated speakers. The Department asserted that there is no indication whatsoever in Northern Micro's bid response that speakers were to be provided and would be integrated to the monitors that it proposed. While Northern Micro agrees with this assertion, it submitted that there was no requirement in the RVD to indicate what sub-components were included in the offerors' bid responses and that the fact that no specific component is mentioned in its bid response in respect of the sound speakers does not mean that such components are not being offered. Rather, Northern Micro submitted that, in the absence of any specific requirement to this effect in the RVD, its general declaration of compliance should be sufficient to prove that it intended to offer the required speakers.

Having carefully reviewed all the evidence, the Tribunal finds, on the basis of the aforementioned provisions of the applicable trade agreements, that the Department's actions were not contrary to the procedures and other requirements prescribed when it concluded that Northern Micro's bid response did not include any speakers at the time of bid opening, whether internally housed or not. The manufacturer's literature for the proposed monitors does not indicate that integrated speakers were included. In fact, in the column for speakers opposite the proposed monitors, the manufacturer indicates "N/A" with respect to the speakers. When requested by the Department on March 19, 1999, to confirm that its bid response included integrated speakers, Northern Micro instead requested a meeting. At the meeting, Northern Micro offered to replace, at no additional cost, the ADI 5GT monitors with a substitute make and model. In the alternative, Northern Micro proposed to provide, at its cost, good quality speakers with each monitor. The Tribunal fails to understand this approach by Northern Micro if, as stated in a letter dated March 19, 1999, Northern Micro's bid included Labtec sound speakers. The Tribunal also notes that, although Northern Micro claims that there was no specific requirement in the RVD to identify the components of the desktop computer system in its bid response, it did so for all deliverables except for the speakers. The Tribunal is of the opinion that, in proceeding as it did, it remained incumbent upon Northern Micro to establish, to the Department's satisfaction, that its bid response, in fact, included speakers. It was reasonable to conclude that it did not.

On balance, therefore, the Tribunal finds that the Department was correct in concluding forthwith upon review that Northern Micro's bid response failed to conform to all the essential requirements of the RVD, in that it did not include integrated sound speakers. In fact, had it not done so, the Department would have put itself in a position where its actions could have been found contrary to the prescribed procedures and requirements of the applicable agreements and tender documentation. Conceivably, this could have opened the Department to a legitimate challenge by other potential suppliers.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the applicable provisions of the AIT and NAFTA and that, therefore, the complaint is not valid.

The Department requested, in the GIR, the opportunity to make further submissions with respect to the award of costs in this matter. As it is unable to conclude that there was bad faith on the part of Northern Micro, the Tribunal will not award costs to the Department in this case.

Richard Lafontaine
Richard Lafontaine
Member