

Ottawa, Wednesday, April 5, 2000

File No.: PR-99-036

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

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.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: April 5, 2000

Tribunal Member: Patricia M. Close

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Michèle Hurteau

Complainant: Unisource Technology Inc.

Counsel for the Complainant: Ronald D. Lunau

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner



Ottawa, Wednesday, April 5, 2000

File No.: PR-99-036

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

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*.

STATEMENT OF REASONS

On December 8, 1999, Unisource Technology Inc. (Unisource) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. W8486-0-0916/A) by the Department of Public Works and Government Services (the Department) of various items of spares for mobile laundry and bath units for the Department of National Defence (DND).

Unisource alleged that, contrary to Articles 1015(4)(c), 1015(4)(d), 1014(2) and 1014(4)(a) of the *North American Free Trade Agreement*² and Articles 501, 504(3)(f), 506(1) and 506(6) of the *Agreement on Internal Trade*,³ the Department, after advising Unisource that it would be awarded a contract for a number of the items covered by the solicitation at issue, attempted to compel Unisource to revise its bid prices.

Unisource requested, as a remedy, that it be awarded the contract for items 6, 11, 12, 13, 14, 18, 34, 35, 37, 38, 39, 40, 42, 44 and 54 (the items at issue). In the alternative, Unisource requested compensation for lost profits, its costs in relation to proceeding with this complaint and such further remedy as the Tribunal considers appropriate.

On December 15, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴ That same day, the Tribunal ordered the Department to postpone the award of any contract in connection with that part of the procurement at issue until the Tribunal determined the validity of the complaint. On January 24, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On February 14, 2000, Unisource filed comments on the GIR with the Tribunal.

-
1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 3. As signed at Ottawa, Ontario, on 18 July 1994 [hereinafter AIT].
 4. S.O.R./93-602 [hereinafter Regulations].
 5. S.O.R./91-499.

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 July 12, 1999, a Notice of Proposed Procurement (NPP) for the solicitation at issue was posted on Canada's Electronic Tendering Service (MERX). The requirement was identified as being subject to NAFTA and the AIT. The NPP also advised that the Crown retained the right to negotiate with suppliers on any procurement.

The Request for Proposal (RFP) for this solicitation incorporated by reference, under Section 1, "Instructions to Bidders/Contractors", clause C0009T, "Sole Source Justification", of the *Standard Acquisition Clauses and Conditions Manual* (SACC Manual), which reads:

1. In the event that your bid is the sole bid received, Government Contract Regulations require price support be submitted in conjunction with the offer. Acceptable price support is one or more of the following:
 - (a) current published price list indicating the percentage discount available to the Department of Public Works and Government Services; or
 - (b) paid invoices for like items (like quality and quantity) sold to other customers; or
 - (c) price breakdown showing, if applicable, the cost of direct labour, direct materials, purchased items, engineering and plant overheads, general and administrative overhead, transportation, profit, etc.

The solicitation closed on August 26, 1999. Three proposals were received, including one from Unisource, which quoted on 32 items. Unisource submitted the only bid on 23 items and the lowest bid on 1 item.

On September 21, 1999, the Department sent a facsimile to Unisource in response to Unisource's telephone inquiry regarding certain pricing errors that it had made. The facsimile requested that Unisource advise whether it would honour or withdraw its bid for items 21, 24, 25, 26, 27, 28, 45 and 48. It also stated that "a contract will [be] awarded for items 6, 11, 12, 13, 14, 18, 34, 35, 37, 38, 39, 40, 42, 44 and 54 [the items at issue] if the above items are withdrawn".

That same day, approximately one hour after the above transmission, the Department sent the same message with the following handwritten sentence added: "All items to be contracted will require a cost breakdown, due to high dollar value of each item".

On September 29, 1999, Unisource responded, in part, that it was withdrawing its bids on items 21, 24, 25, 26, 27, 28, 45 and 48. It further indicated that attached, as Appendix "D", were price breakdown sheets covering items 6, 12, 13, 14, 18, 22, 23, 34, 35, 37, 38, 39, 40, 42, 44 and 54. Finally, Unisource indicated that, because of the low value of unit prices of items 22, 23, 34, 35 and 54, it would only provide, as Appendix "C", price certification forms, which it assumed would be acceptable.

On October 1, 1999, the Department contacted Unisource, by telephone, to request that Unisource substantiate its stated manufacturers' FOB plant price. A confirming facsimile was sent by the Department that same day. Item 2 of the above facsimile reads:

As per our telecon, I had informed you that this contract is not within my authority. I have been asked to have you provide verification of the manufacturer's price.

On October 5, 1999, the Department, having received no response to its request of October 1, 1999, resent the same communication with the following handwritten sentence added: "Please advise para. 2.". On October 6, 1999, Unisource responded, in part, as follows:

However, from your message of Oct 1, 1999, we now understand that additional price support information is required, in the form of copies of original quotations from our vendors. Unfortunately, we are unable to furnish this information as it is confidential and proprietary to our firm and cannot be released.

Unisource also trusted that its reply would not jeopardize its bid in any way.

On October 6, 1999, the Department contacted Unisource, by telephone, offering to go to Unisource's place of business in order to view the actual manufacturer's quotes to confirm the prices shown by Unisource on its cost breakdown forms. Unisource denied this request.

Between October 12 and 21, 1999, the Department, continuing its evaluation of Unisource's bid, sought independent verification of the manufacturer's price, as stated by Unisource. To that end, the Department examined DND's estimates in the requisition. However, since the estimates were based on 12-year old pricing data and since no relevant pricing data for the items at issue were available from the Item Information System (IIS), the Department decided to conduct a price and availability inquiry to the named manufacturer for the six highest-priced items (items 11, 12, 13, 14, 38 and 44) quoted by Unisource. Together, these items represented 88.75 percent of the value of the items at issue. The price and availability inquiry consisted of a written request to the manufacturer of the six items listed above, without any mention being made in the request about Unisource's bid or information concerning the solicitation at issue.

The Department submitted that the price and availability exhibited differences in pricing between the manufacturer's quotes and Unisource's quoted manufacturer's price, the latter being from 1.5 times to 67 times higher. This was not including Unisource's markup in its bid.

On October 21, 1999, the Department notified Unisource that it conducted a marketing survey on the items that Unisource had quoted and that it had determined that Unisource's prices were extremely excessive in relation to others available. The Department also asked if Unisource would be willing to revise its prices downward or to confirm that its prices were to remain as quoted.

On October 25, 1999, the Department wrote again to Unisource requesting a response to its communication of October 21, 1999. On October 27, 1999, Unisource asked for more time to respond to the Department's request. On October 28, 1999, Unisource responded in writing to the Department, setting out in detail its understanding of the procurement process to date and indicating that, in its view, the Department's actions contravened NAFTA and departmental policies. Unisource also requested that the Department immediately contract with Unisource, failing which it would file a complaint with the Tribunal.

On November 10, 1999, the Department wrote to Unisource indicating that no contract would be awarded to Unisource in respect of "the items at issue". The Department noted that Unisource had not provided the cost breakdown required, nor was it willing to negotiate lower prices. Pursuant to clause C0009T of the SACC Manual, incorporated by reference in the RFP, and paragraph 7.441 of Section 7D of Chapter 7 of the Supply Manual, the Department determined that the prices, quoted by Unisource in respect of "the items at issue" were not fair and reasonable. The Department informed Unisource that it intended to reissue the bid solicitation to the manufacturer to obtain more favourable pricing. On November 12, 1999, Unisource asked the Department to reconsider its November 10, 1999,

position as it would be in breach of contract and of NAFTA. On November 25, 1999, the Department reiterated its position of November 10, 1999, clarifying that it was the lack of support for the cost breakdown that was at issue. On December 8, 1999, Unisource filed this complaint with the Tribunal.

POSITION OF PARTIES

Department's Position

The Department submitted that Unisource filed its complaint with the Tribunal outside of the 10 working days prescribed under subsections 6(1) and (2) of the Regulations and that none of the circumstances set forth in subsection 6(3) of the Regulations apply to this case.

The Department submitted that Unisource knew the basis of the complaint on October 1, 1999, or at the latest on October 28, 1999. Furthermore, the Department submitted that it unequivocally rejected Unisource's objection and provided reasons for denial of relief in its letter of November 10, 1999. Therefore, under the provisions of subsection 6(2) of the Regulations, Unisource had until November 24, 1999, to file a complaint with the Tribunal. Unisource filed its complaint on December 8, 1999, and its complaint is, therefore, late.

In the alternative, the Department submitted that Unisource's bid was non-responsive, in that Unisource refused repeatedly to provide the information required by the Department by virtue of clause C0009T of the SAAC Manual, incorporated by reference in Section 1 of the RFP.

The Department submitted that the actions that it initiated, following Unisource's refusal to provide the required price support information, constituted actions in good faith in accordance with well-established departmental contracting policy and did not contravene the requirements of the trade agreements. Furthermore, the Department argued that no proprietary information in Unisource's bid was divulged to the manufacturer or made public. The procurement provisions of the trade agreements, the Department submitted, are neither intended nor interpreted to hold the government and taxpayer hostage to excessively high pricing in circumstances where only one bid is submitted. On the contrary, the Department has an obligation to ensure that it conducts an evaluation of the bid to ensure fair value to the taxpayer.

The Department argued that the terms of the NPP and the RFP specifically afforded it the right to enter into negotiations with a bidder. As well, the Department disputed Unisource's contention that Article 1014(2) of NAFTA precludes price negotiation. The Department submitted that Article 1014 of NAFTA, when read as a whole, properly applies to circumstances in which more than one bid is received in response to a call for tenders.

The Department submitted that its communication of October 21, 1999, with Unisource was not an ultimatum, but an invitation to negotiate. The Department was not indicating any specific pricing to Unisource with respect to the items at issue, but was asking if Unisource would indicate a willingness to revise its prices downward or provide confirmation of its pricing. Furthermore, contrary to Unisource's assertion that the Department can reject a bid only in circumstances where the "Vendor Performance" clause of the RFP applies, the Department submitted that: (1) clause C0009T of the SAAC Manual permits the Department to reject a bid where the bidder has failed to provide credible price support; (2) clause 9403(2) of the "Standard Instructions and Conditions" of the SAAC Manual, referenced in the RFP, provides that bids may be accepted in whole or in part and that the lowest or any bid will not necessarily be accepted; and (3) Clause 9403(4) of the "Standard Instructions and Conditions" of the SAAC Manual provides that the

Crown reserves the right to negotiate with bidders. All these clauses were incorporated by reference into the RFP and, therefore, formed part of the RFP.

Furthermore, the Department submitted that Article 1016(2)(a)⁶ of NAFTA applies to the circumstances of this procurement and that, therefore, it acted correctly in notifying Unisource that the requirement would be directed to the only known manufacturer of the items at issue.

The Department also stated that it did not discriminate against Unisource, but acted at all times in good faith, affording Unisource every opportunity to comply with the requirements of the tender documents. As well, the Department indicated, it was not biased in favour of the manufacturer regarding the items at issue, as evidenced by the fact that it did not immediately reject Unisource's excessively high bid, but offered to negotiate with Unisource. The decision to reissue the solicitation to the manufacturer was only made after attempts to negotiate with Unisource proved unsuccessful.

Finally, the Department disputed Unisource's contention that the Department's communication of September 21, 1999, constituted an agreement to award a contract to Unisource for certain items. No such agreement existed in law, because the parties were not at *idem*. Specifically, there was no agreement between the parties with respect to the items to be contracted or with respect to the price. Further, the Department submitted that Unisource acknowledged both by its actions and its subsequent written communications to the Department that no agreement to award a contract existed by virtue of the September 21, 1999, facsimile and that there is no evidence that Unisource acted on the first facsimile of September 21, 1999, for example by placing an order with a supplier or otherwise.

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

Unisource's Position

Unisource submitted that, for purposes of calculating the start date for the complaint under subsection 6(2) of the Regulations, the relevant correspondence is the Department's letter of November 25, 1999, which denied Unisource's objection made on November 12, 1999. As such, Unisource submitted, its complaint was filed in a timely manner.

Unisource submitted that the Department's offer of September 21, 1999, to award a contract to Unisource could only be premised on the fact that Unisource's bid for the items at issue was compliant and responsive (and presumably within the Government's budget for this requirement). Furthermore, Unisource submitted that, in its September 29, 1999, letter to the Department, it withdrew its bid on certain items and provided a "cost breakdown". Upon satisfaction of the two conditions in the Department's original letter of September 21, 1999, the contract award, Unisource argued, was complete, and the Department cannot now argue that Unisource's bid was non-responsive.

-
6. 2. An entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable:
- (a) in the absence of tenders in response to an open or selective call for tenders, or where the tenders submitted either have resulted from collusion or do not conform to the essential requirements of the tender documentation, or where the tenders submitted come from suppliers that do not comply with the conditions for participation provided for in accordance with this Chapter, on condition that the requirements of the initial procurement are not substantially modified in the contract as awarded.

Unisource submitted that the Department erred in relying on the SACC Manual, since clause C0009T does not require the provision of the manufacturer's price lists in order to substantiate a price breakdown. Further, the manufacturer's price list was not a term of the RFP. Unisource submitted that the Department's insistence on receiving a manufacturer's price as the only acceptable form of price support was contrary to clause C0009T and effectively incorporated, after bid closing, a new provision into the RFP. This, Unisource argued, is a breach of Article 1015(4)(d) of NAFTA and Article 506(6) of the AIT. Unisource further submitted that, considering that the Supply Manual was not incorporated by reference into the RFP, the Department lacked the proper authority for importing, after bid closing, a new provision into the RFP or for conducting a market survey during the course of the bidding process.

According to Unisource, what happened in this case after bid closing could hardly be called negotiations. In effect, Unisource argued, it was given an ultimatum to either revise its bid price downward after bid closing or lose the contract. However, Unisource submitted, even if it could be said that negotiations occurred, the so-called negotiations were not consistent with the negotiation provisions of NAFTA. First, Unisource submitted that the mere reservation of a right to negotiate in a standard condition clause which is appended to an RFP does not constitute a clear statement of the intention to negotiate in the case of that particular solicitation. As well, there is no authority for the Department to engage in negotiations respecting criteria, such as manufacturer's prices, which were not mentioned in the SACC Manual or incorporated in the RFP. Article 1014(4) of NAFTA specifically mandates that the elimination of suppliers in the course of negotiations shall be made in accordance with the criteria set out in the notices and tender documents.

Unisource argued that reliance on undisclosed criteria (i.e. the use of manufacturer's prices as the only acceptable form of price support) is a breach of the tendering contract. In this case, the Department breached the trade agreements and its duty of fairness when it relied on undisclosed criteria.

Concerning the Department's reliance on Article 1016(2)(a) of NAFTA to support its decision to reissue the tender to the manufacturer, Unisource submitted that the limited tendering procedures set out in NAFTA do not apply in this case, as it would constitute discrimination in favour of a nontenderer. Furthermore, Article 1016(2)(a) of NAFTA applies only in the "absence of tenders" or where "tenders . . . do not conform to the essential requirements of the tender documentation", and neither of these two prerequisites, Unisource submitted, existed in the circumstances. Finally, Unisource submitted that the Department was under the obligation not to accept, let alone attempt to compel, price changes after the close of the tendering process.

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 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 provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with NAFTA and the AIT.

The Tribunal will first address two preliminary questions raised by the parties, i.e. whether Unisource filed its complaint with the Tribunal in a timely manner and whether, in fact, the Department awarded a contract to Unisource by means of its original facsimile of September 21, 1999.

The Tribunal is satisfied that Unisource filed its complaint with the Tribunal in accordance with the provisions of subsection 6(2) of the Regulations and that it is, therefore, timely.

In the Tribunal's opinion, Unisource discovered its grounds of complaint on or about November 10, 1999, when it was informed by the Department that certain prices were unfair and unreasonable and that, consequently, the solicitation would be reissued to the manufacturer of the goods. Unisource objected to this decision on November 12, 1999, and on November 25, 1999, the Department denied Unisource's objection in the matter. Unisource filed its complaint with the Tribunal on December 8, 1999. On this basis, the Tribunal determined that both the objection made by Unisource and the complaint filed with the Tribunal fall within the 10 working days prescribed under subsection 6(2) of the Regulations and that, therefore, Unisource's complaint was timely.

On the question of whether a contract was formed between the Department and Unisource on the basis of the Department's first facsimile of September 21, 1999, the Tribunal determines that no such contract existed. Upon review of the record, the Tribunal finds that the first facsimile of September 21, 1999, from the Department to Unisource was superseded by the second facsimile of that same date, also by the Department to Unisource. The second facsimile requests clarification from Unisource on the cost breakdown of its prices. Unisource did not reply to the first facsimile of September 21, 1999, and, therefore, the Tribunal finds that there was no meeting of the minds as of that date on the items at issue to be procured or on the prices quoted. The Tribunal is satisfied that the second facsimile of September 21, 1999, made it clear to all involved that the Department required and expected price clarification on a number of items in order to complete its evaluation of Unisource's proposal. The Tribunal is also satisfied that Unisource did not rely on the first facsimile of September 21, 1999, nor did it act on it. The evidence shows that Unisource relied on the second facsimile of September 21, 1999, as it responded to it on September 29, 1999, by withdrawing its bid on the items as requested and by providing price breakdown sheets and price certification forms for the items at issue. The Tribunal is further persuaded that Unisource knew that the Department expected price clarification, as evidenced by its October 6, 1999, letter to the Department where it stated that it was unable to provide the original price quotations from its vendors because the information was proprietary and confidential, and stating that it trusted that its response would not jeopardize its bid in any way. Therefore, as there was no meeting of the minds on September 21, 1999, by the parties and as Unisource responded to the second facsimile of September 21, 1999, on September 29, 1999, the Tribunal finds that there was no contract between the Department and Unisource and that the former was entitled to continue its evaluation of Unisource's proposal after September 21, 1999.

Turning to the merits of the case, the Tribunal needs to determine whether the Department acted in accordance with the provisions of the AIT and NAFTA and the terms of the RFP in declaring Unisource's proposal non-responsive.

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 methods 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". Article 1015(4)(d) further provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

The Tribunal determines that the Department acted in accordance with the applicable provisions of NAFTA and the AIT in declaring Unisource's proposal non-responsive and in not awarding a contract to Unisource.

The Tribunal is satisfied that, in this instance, price is a mandatory or essential requirement of the RFP. In the Tribunal's opinion, bidders were not only required to submit prices but, in the event that only one bid was received, as clause C0009T of the SACC Manual was incorporated by reference under Section 1 of the RFP, the Department was at liberty to require acceptable price support. The parties are not disputing the existence of this clause in the RFP or that the Department was entitled to require price support information. The parties, however, are at odds as to what constitutes acceptable price support. Unisource is of the view that providing the information requested by the Department on September 21, 1999, should have been sufficient, whereas the Department, for its part, argued it was entitled to satisfy itself as to the accuracy of the information provided. In the Tribunal's opinion, the Department was entitled to obtain by or through Unisource, all the information that it reasonably required to satisfy itself that the price support information provided by Unisource was accurate. The Tribunal is satisfied that the Department first tried to obtain the said information by or through Unisource by asking that Unisource provide confirmation in the form of manufacturer's quotes or invoices and then by proposing to view the required confirming information at Unisource's place of business. All these attempts were unsuccessful due to Unisource's insistence that the required information was confidential and proprietary and could not be released.

In the Tribunal's opinion, the fact that the confirming information may be confidential and proprietary to Unisource is not germane to deciding whether the Department was entitled to request the information to finalize its evaluation. The Tribunal is of the view that Unisource, by refusing to let the Department view the price support information, did not meet its obligation for price support. If, as is apparent, Unisource was concerned about the protection of certain information, it could have communicated the information to the Department under the restriction of confidentiality. This is done regularly and the Department is fully equipped to ensure such protection. The Tribunal believes that Unisource, by refusing to provide the information requested, enabled the Department at that point to declare Unisource's proposal non-responsive. The fact that the Department came to that view, i.e. to declare Unisource's proposal non-responsive on the basis of its own price review, does not change the Department's legitimate position to declare Unisource's proposal non-responsive for failing to provide acceptable evidence in support of its prices. Consequently, the complaint is not valid.

The Department, in the GIR, indicated that it is entitled in the circumstances to sole-source this requirement, resorting to the provisions of Article 1016(2) of NAFTA. The Tribunal observes that there appear to be at least two suppliers for the required goods, that considerable time has elapsed since the solicitation was issued. The proposed sole-source action at another level of trade would be a separate procurement and, therefore, could be the subject of a new complaint.

The Department requested in the GIR the opportunity to make further submissions with respect to the award of costs in this matter. The Tribunal has decided that the circumstances of this case do not warrant costs against Unisource. While Unisource's complaint is not valid, it was not without merit.⁷ Therefore, submissions on this matter are not necessary, and no costs will be awarded.

7. *Flolite Industries Addendum* (7 August 1998), PR-97-045 (CITT).

DETERMINATION OF THE TRIBUNAL

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

Patricia M. Close _____

Patricia M. Close
Presiding Member