

Ottawa, Monday, December 22, 1997

File No.: PR-97-029

IN THE MATTER OF a complaint filed by Hitachi Data Systems 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 the Tribunal's jurisdiction to conduct an inquiry into this complaint.

REASONS FOR DECISION

INTRODUCTION

On November 14, 1997, Hitachi Data Systems Inc. (Hitachi) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the lease by the Department of Public Works and Government Services (the Department) of an IBM central processing unit (CPU) with 28 ESCON channels, 15 parallel channels, 2 gigabytes of storage and one Ethernet/Token Ring OSA2 card to implement the database component of the Royal Canadian Mounted Police (RCMP) Integrated Finance/Material Management System (Solicitation No. M9087-7-2804/A).

On November 19, 1997, the Canadian International Trade Tribunal (the Tribunal) informed the Department that, on the basis of the existing record, the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² had been met in respect of the complaint and, therefore, that the Tribunal had decided to conduct an inquiry into the complaint.

An advance contract award notice for this solicitation was posted by the Department on the Open Bidding Service on October 21, 1997. The notice identified the goods being leased as falling within Goods and Services Identification Number WL7010. By virtue of Annex 1001.1b-1 of the *North American Free Trade Agreement*³ (NAFTA) and Annex 1 of the *Agreement on Government Procurement*⁴ (AGP), goods in class 7010 of the Federal Supply Classification (FSC) system are excluded from the coverage of NAFTA and the AGP when procured, *inter alia*, for the RCMP. The Tribunal had raised the issue of its jurisdiction to inquire into this procurement with Hitachi prior to it completing the filing of its complaint. In this regard, Hitachi initially submitted that the Department was procuring a CPU for which the relevant code is FSC class 7021, which provides for "Automatic Data Processing Central Processing Unit (CPU, Computer), Digital." The goods in FSC class 7021 are included in the coverage of NAFTA and the AGP when procured by the RCMP, subject only to the applicable monetary thresholds. Given these submissions and the classification of the goods being procured by the Department, the Tribunal requested that the Department make submissions on the issue of the proper classification of the goods in this solicitation and comment on Hitachi's position. The Department responded to the Tribunal's request on November 26, 1997, and made further comments on December 2, 1997. Hitachi, for its part, made further comments on November 28 and December 5, 1997.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
3. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
4. As signed in Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

FSC class 7010 reads, in part, as follows:

Note. - A group of general purpose analog, digital, or hybrid electronic or electromechanical devices that are interconnected to operate as a system. Frequently referred to as an ADP system, although the term "system" is not considered definitive. Includes an assembly of devices consisting of a central processing unit (CPU) and the necessary input/output devices, accessorial devices, analog measurement devices, software and/or firmware required to perform the desired objectives. Also includes sub-assemblies and units in which input/output devices, CPUs, and/or accessorial devices or components are incorporated into a single assembly or unit.

FSC class 7021 reads, in part, as follows:

This class includes only CPUs that accept information represented by digital impulses. Specifically, a device capable of performing sequences of arithmetic and logic operations (a program) not only on data but also on the program which is contained in its internal memory (storage) without intervention of an operator.

The Department submits that this procurement is excluded from the coverage of NAFTA and the AGP because it pertains to an automated data processing equipment system configuration categorized within FSC class 7010. The solicitation, the Department submits, is for a digitally configured system consisting of an assembly of the following devices required to perform the desired objectives: a CPU with 2 gigabytes of storage; an Ethernet/Token Ring OSA2 card, an accessorial device, as contemplated by FSC class 7010; and firmware and microcode software, the software and/or firmware devices as contemplated by FSC class 7010. Although the system does not include analog measurement devices and input/output devices, it does include sub-assemblies as contemplated by FSC class 7010, e.g. 28 ESCON channels and 15 parallel channels which are attached to the mainframe CPU.

The Department also submits that there is no requirement that all the various devices listed in FSC class 7010 be included in the procured system in order for it to meet the definition of "assembly of devices" contained in FSC class 7010. Finally, the Department submits that the procurement cannot be categorized under FSC class 7021 because this class of goods applies only to the purchase of individual CPUs and not system configurations.

Hitachi submits that, for a procurement to fall within FSC class 7010, there must be an "interconnection" of several discrete devices. In this instance, Hitachi submits that the solicitation is not for a mainframe computer system configuration which is an "assembly of devices." Rather, the solicitation is for a digital CPU. The IBM 9672-R24 CPU is a CPU under FSC class 7021, and the Ethernet/Token Ring OSA2 card is a part of the CPU, not an "accessorial device." Further, Hitachi submits that the microcode (firmware) is integral to the CPU and is required for the CPU itself to operate and not for the objective of any system in association with which the CPU may be used. Moreover, the ESCON channels and parallel channels are not sub-assemblies in which various devices are incorporated nor separate devices interconnected to the CPU. They are integral parts of the CPU.

Hitachi agrees that it is logical that FSC class 7010 apply to a CPU which is interconnected to some, but not all, of the devices listed in FSC class 7010. In the present case, however, the CPU does not contain all the necessary devices required to perform the desired objectives of the system. Rather, it is a plain and simple CPU. Finally, Hitachi submits that the interpretation of FSC class 7010 being urged by the Department is one which would include parts of a modern CPU. If that interpretation is accepted, then, Hitachi submits, FSC class 7021 will become a hollow FSC code item within which no CPU will ever fall. This cannot be, as FSC codes must be interpreted to give meaning to each of the code items.

TRIBUNAL'S DECISION

Annex 1001.1b-1 of NAFTA and Annex 1 of the AGP provide that goods classified under FSC class 7010 are excluded from these agreements in respect of Canada when such goods are procured for the RCMP, as is the case here. However, all other classes of goods in FSC group 70 are covered by NAFTA and the AGP for all listed entities for Canada, including the RCMP, subject only to the applicable monetary thresholds.

In this instance, the estimated value of the proposed procurement exceeds the NAFTA and AGP applicable monetary thresholds. This is not in dispute.

The only question, then, for the Tribunal to decide is whether the goods being procured fall within FSC group 70 and, more specifically, within FSC class 7010.

Hitachi has argued that, in deciding this question, the Tribunal must adopt an interpretation of the FSC system that gives meaning to each of the code items. The Tribunal agrees with this position. The Tribunal notes, however, that such a position cannot imply that it shall classify goods under any particular code item should technology advances cause the disappearance of such goods. The Tribunal understands that the goods being acquired will, along with software and input/output devices already in the possession of the RCMP, constitute the Integrated Finance/Material Management System of the RCMP. What the Tribunal must consider, however, is the appropriate classification of the goods being acquired at the time of acquisition and not the classification of such goods according to their ultimate destination or use. Further, the Tribunal realizes that the group and class descriptions of the FSC system have not been revised for some time. This represents a complicating factor, particularly in the field of automatic data processing equipment where ongoing rapid technological developments and innovations have rendered the classification of certain goods under specific FSC classes a complex exercise.

The Tribunal, nevertheless, concludes that the goods subject to this procurement are something less than a "configuration," as that term is used in FSC class 7010 and, therefore, cannot be referred to as a "group of general purpose ... electronic or electromechanical devices that are interconnected to operate as a system." In and by themselves, the goods being procured cannot function as a system nor deliver the intended objective. The Tribunal is persuaded that, in the circumstances of this case, they are more appropriately classified under FSC class 7021. As the goods do fall within FSC group 70, but do not fall within FSC class 7010, the goods cannot be said to be excluded from the coverage of NAFTA or the AGP by virtue of Annex 1001.1b-1 of NAFTA and Annex 1 of the AGP.

For these reasons, the Tribunal determines that the subject procurement is a designated contract under NAFTA and the AGP and, therefore, that it has jurisdiction to continue its inquiry into this matter.

Raynald Guay

Raynald Guay

Member