

28 April 1992

NORWAY - PROCUREMENT OF TOLL COLLECTION EQUIPMENT
FOR THE CITY OF TRONDHEIM

*Report of the Panel adopted by the Committee on
Government Procurement on 13 May 1992
(GPR.DS2/R)*

I. INTRODUCTION

1.1 In document GPR/W/106 of 11 June 1991 the United States informed the Committee on Government Procurement ("the Committee") that bilateral consultations had been held with Norway under Article VII:4 of the Agreement on Government Procurement ("the Agreement") on the procurement by Norway of an electronic toll collection system for the city of Trondheim. Since these
f the Committee
pursuant to Article VII:6 of the Agreement. This meeting was held on 20 June 1991 (GPR/M/40, paragraphs 2-24). In document GPR/W/108 of 11 September 1991, the United States informed the Committee that no progress had been made towards a mutually satisfactory solution and requested a meeting of the Committee. In document GPR/W/110 of 20 September 1991, the United States requested the establishment of a panel pursuant to Article VII:7 of the Agreement and set out the complaint that it would like the Panel to address. The Panel was established by the Committee at a meeting held on 23 September 1991 (GPR/M/42, paragraphs 2-3).

1.2 On 25 October 1991, the Chairman of the Committee informed the Committee that the Panel would have the following composition and terms of reference (GPR/62):

Composition

Chairman: Mr. Peter Williams
Members: Mr. Alexander Karrer
Mr. Roy Kilvert

Terms of Reference

"To examine, in the light of the relevant provisions of this Agreement, the matter referred to the Committee by the United States in document GPR/W/110; to consult regularly with the parties to the dispute and give full opportunity for them to develop a mutually satisfactory solution; and to make a statement concerning the facts of the matter as they relate to the application of this Agreement and to make such findings as will assist the Committee in making recommendations or giving rulings on the matter."

1.3 The matter referred to the Committee by the United States was described in document GPR/W/110 as follows:

"Pursuant to the provisions of paragraph 7 of Article VII of the Agreement on Government Procurement, the United States requests the establishment of a panel to examine a procurement conducted by the Government of Norway for electronic toll collection equipment for the city of Trondheim.

In conducting this procurement, the Government of Norway has single tendered the equipment from a Norwegian supplier, excluding viable and eager competition from a capable United States supplier. The United States considers this Norwegian action to be inconsistent with Norway's obligations under this Agreement, particularly the obligations of Article II concerning national treatment and non-discrimination. The United States also maintains that the Government of Norway's actions in this matter cannot be justified under the terms of Article V:16(e) of the Agreement, or any other provision of the Agreement.

The United States further considers Norway's action in this matter nullifies and impairs

3.2 On the above grounds, the United States requested the Panel to find that Norway had violated its obligations under the Agreement in the conduct of the procurement of toll collection equipment for the city of

(ii) Article V:16(e), including its Headnote

3.8 The United States argued that, since paragraph 16 of Article V constituted an exceptions provision, the burden of proof lay with Norway to demonstrate that it had acted consistently with its requirements. The United States also maintained that, as an exceptions provision, Article V:16(e) had to be construed narrowly.

3.9 The United States argued that the contract was not to procure research and development. In the procurement under consideration, the Norwegian Public Roads Administration had not had as its principal purpose the procurement of research and development, i.e. the purchase of the results of such research and development; rather, it had had as its principal purpose the procurement of a functioning toll collection

production



3.17 Norway maintained that the United States had presented no evidence substantiating the United States' allegation that the Trondheim procurement was a matter of customisation and putting together commercially available technologies. The planning of the Trondheim toll ring had been initially based on the assumption that existing technical solutions would be sufficient to cover the project requirements in Trondheim. As part of the project preparations, a study had also been undertaken of solutions based on commercially available technologies in other fields. None of the commercially available solutions or technologies had, however, been found to be applicable to

company, Amtech, which was a known and eager supplier. Amtech had been known to the Norwegian authorities as a world leader in providing equipment of the type required by the Trondheim toll ring. In the exchange of letters between the United States and Norway following the previous procurement of a toll collection system by Norway for the city of Oslo, Norway had recognised that Amtech's technology had been found to be "proven, reliable, competitive, type approved by the PTT and commercially available" as well as able to "satisfy the requirements set up for the Oslo Toll Ring Project". Amtech's interest in bidding for the Trondheim project had been emphasised repeatedly by Unite

3.23 Norway rejected the United States' depiction of the Norwegian authorities as having used the government procurement system to support a national supplier of electronic toll systems to give it a competitive edge. The Norwegian Public Roads Administration had been in a position to judge the respective suitability of Micro Design and Amtech for the research and development contract because of its experience with the Oslo procurement and because it had kept itself abreast of developments in electronic toll collection systems and of the projects under way. One of the challenges in Trondheim had been to integrate a highly advanced digital video control system with the payment system, and to develop alarms,

(iv) Article IV:2 and Article IV.4

3.27 United States contended that Norway had not complied with the requirement of Article IV:4 that "procurement entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement". Norway had admitted that Micro Design had worked to improve an earlier rejected proposal for the Trondheim project and had proposed a concept which had been subsequently adopted as the basis for the toll collection system. Norway had described how Micro Design, "as one of the 'architects' of the proposed concept", had been awarded the contract. The United States concern was not that the procuring entity had received unsolicited ideas as such, but that this had been done in the process of preparing "specifications for

it was Norwegian and European policy in the DRIVE programmes to establish common open standards for AVI systems and not to prescribe the use of proprietary technology.

3.32 Norway argued that, given that the contract with Micro Design did not contain technical specifications but general functional requirements, no violation of Article IV:2 could have taken place.

(v) United States Request for a Panel Recommendation that Norway Negotiate a Mutually Satisfactory Solution with the United States

3.33 The United States requested the Panel to recommend that Norway negotiate a mutually satisfactory solution with the United States that took

Committee recommendations to the resolution of disputes on the basis of the operative provisions of the Agreement and of its objectives set out in the Preamble. No previous panel under the Agreement on Government Procurement had recommended compensation. Moreover, the practice of panels under other parts of the GATT

4.3 The Panel first considered the question of the coverage of the procurement by the Agreement. It noted that the Norwegian Public Roads Administration was an entity subject to the Agreement, and that this was accepted by the parties to the dispute. There was, however, a difference of

4.7 In examining this issue, the Panel first noted that, while the provision referred to "research, experiment, study or original development", the parties to the dispute had referred only to h

1

4.9 The Panel did not mean to suggest by this that the results of the research and/or original development would necessarily have to be procured solely in abstract form, for example as scientific papers. The results could be w

4.10 In the light of the above, the Panel considered that, in order to be covered by sub-paragraph (e) of Article V:16, Norway would have had to have demonstrated, among other things, that (i) the Norwegian Public Roads Administration had had as its principal purpose in concluding the contract the procurement of the results of research and/or original development from Micro Design, and (ii) that the principal purpose of the equipment procured from Micro Design under the contract had been to test and provide a means of further developing the knowledge generated through that research and/or original development. In the view of the Panel, Norway had demonstrated neither of these points.

4.11 All the information provided by Norway to the Panel indicated that the principal purpose of the contract of the Norwegian Public Roads Administration with Micro Design had been the procurement of operational toll collection equipment for a functioning toll ring system. Norway had emphasised to the Panel the importance that the procuring entity attached to a speedy establishment of the toll ring as a fully operational system, for financial reasons in particular. The Panel further noted that Norway had said:

"What the procuring entity had needed from the contract was not the research and development results as such, but, with regard to matters before the Panel, prototypes as part of the solutions

could not be justified under that provision. Given that the Panel had found that the single tendering of the procurement could not be justified under Article V:16(e) and that it had not been justified under any other provision of the Agreement, the Panel concluded that Norway had not complied with its obligations under the Agreement in the conduct of the procurement.

4.15 The Panel then considered the other provisions invoked by the United States. Given that the Panel had found that Norway had unjustifiably single tendered the procurement with a Norwegian company, the Panel found that Norway had failed to comply with the obligation in Article II:1 to provide the suppliers of other Parties treatment no less favourable than that accorded to domestic suppliers.

4.16 The Panel then turned to Article IV of the Agreement. It understood the basic argument of the United States to be that advice from Micro Design had been used in the preparation of the specifications for the procurement in a manner which had helped Norway consider that the use of a research and development contract that could be single tendered was justified; i.e. the advice had been accepted "in a manner which would have the effect of precluding competition" and thus inconsistently with Article IV:4. Since the act of single tendering had precluded competition and since the Panel had already found that the contract should not have been single tendered, the Panel did not make a finding on Article IV.

4.17 The Panel then turned its attention to the recommendations that the United States had requested it to make. In regard to the United States' request that the Panel recommend that Norway take the necessary measures to bring its practices into compliance with the Agreement with regard to the Trondheim procurement, the Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel's proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to make such a recommendation. Recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendations be within the task assigned to panels under standard terms of reference. Moreover, the Panel considered that in the case under examination such a recommendation might be disproportionate, involving

4.20 The Panel noted that the United States had indicated that it was not asking the Panel to recommend the negotiation of compensation for past losses. However, if this was not the case, it was not evident to the Panel what it was being asked to recommend that Norway negotiate with the United States. Clearly the "lost opportunities" referred to were past opportunities and the remedial action that might be negotiated taking into account these lost opportunities would have to be in the future and therefore in all probability compensatory. The request concerning withdrawal of benefits also confirmed to the Panel that the practical effect of the recommendations sought by the United States would be to invite Norway to offer compensation, in one form or another, to the United States for past losses. Given that the United States had indicated that this was not what it was seeking, the Panel had some difficulty in responding to this request, despite hav1 0 0 1 86.4 719.76 Tm/onding

4.26 In the light of the above, the Panel did not consider that it would be appropriate for it to

ANNEX

The Content of the Contract with Micro Design

The following information is an unofficial translation provided by Norway of the relevant paragraphs of the contract.

The R&D contract contains the following basic elements:

- information concerning the R&D task
- description of the R&D task
- project management and personnel plan
- project implementation
- budget and payment plan
- legal matters
- rights and obligations

Information concerning the R&D task: the task involves the use of an ISDN pilot program for the toll ring around Trondheim. The development project will be implemented in collaboration with and co-ordinated with Trondheim Telecom, the Norwegian Institute of Technology, the Centre for Technical and Industrial Research (SINTEF), and other companies and institutions.

The task comprises developing and supplying full-scale prototype payment equipment for ten unmanned toll stations. The stations will form a toll ring around and through the city of Trondheim.

The project also involves fully automated, unattended payment system in two parking garages and automatic selective detection and information system for buses. The project will also involve integration of this system with the system at the toll stations.

Communication between the various system units (data concerning transactions, images, speech, statistics, alarms etc.) will be carried out in co-operation with Trondheim Telecom through development of the latter's pilot ISDN network.

Development of prototypes: 10 prototype toll stations for unmanned operation, 2 prototype control units for car parks, and 1 prototype bus priority unit are to be developed under the R&D contract.

Project management and personnel: Micro Design is responsible for the technical implementation of the task as described.

A personnel plan is set out with names and titles of 23 persons participating in the project, designating one person as responsible for the project and key personnel.

Project implementation: The procuring entity is the Public Roads Administration, which has delegated the day-to-day responsibility to the Chief County Roads Officer at the Sør-Trøndelag County Roads Office.

The general, functional requirements on which the R&D contract is based, shall be converted into detailed, functional requirements and technical solutions and specifications. This work shall be performed in close co-operation with the procuring entity, which sets the functional requirements and

approves the technical

C. Giving priority to public transport

The purpose of the project is to design, implement and test a prototype that satisfies the following requirements:

- * The system shall be capable of updating and transferring timetables and schedules from the bus operation centre to the registration unit.
- * Electronic equipment is to be built into cabinets similar to the ones used for electronic equipment in traffic lights.
- * The equipment shall be capable of updating and transferring status and log files via a communications module.

D. Parking garage

In phase 1, the system shall comprise the following components:

- recording units including aerial system in two parking garages (Bakke and Leutenhaven)
- communication units for on-line transfer of data from the parking garages to a central control unit (modems)
- the Trondheim municipal parking company will provide a computer system to handle required subscription management.

In its final form (phase 2), the system shall comprise the following components:

- two registration units (one in each parking garage), each servicing two antennae
- recording units, redesigned for low unit price
- development of an updated and integrated subscription management account system.

E. Communications facilities

An unmanned system distributed over a wide area involves more stringent requirements as regards data communication.

The communications facilities are part of the pilot program of Trondheim Telecom, which is also in charge of developing and testing the facilities, and provides the equipment.

The supplier shall develop equipment that satisfies Norwegian Telecom's requirements as regards ISDN communications equipment.

F. Systems integration - alarms and self-testing routines

As the requirements for operational reliability are very stringent, new routines shall be developed for self-testing and alarms at all levels of the system. All alarms, functions and messages for the unmanned stations must be monitored from the manned toll stations. The personnel must also be able to assist motorists at the unmanned stations, and this requires video surveillance and voice communication.

G. Video follow up system

Pictures of motorists who pass a toll station illegally shall be transferred automatically from the toll stations to the toll company via the telecommunications network. The