



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2015-041

Tektronix Canada Inc.

*Decision made  
Friday, November 20, 2015*

*Decision issued  
Friday, November 20, 2015*

*Reasons issued  
Thursday, December 3, 2015*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

**BY**

**TEKTRONIX CANADA INC.**

**AGAINST**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**DECISION**

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Rose Ritcey \_\_\_\_\_  
Rose Ritcey  
Presiding Member

The statement of reasons will be issued at a later date.

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (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. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

### SUMMARY

2. On November 17, 2015, Tektronix Canada Inc. (Tektronix) filed a complaint relating to a Request for Proposal (RFP) (Solicitation No. W7702-165738/A) by the Department of Public Works and Government Services (PWGSC) on behalf of Defence Research and Development Canada (DRDC) Suffield for the provision of a low-noise high speed real-time oscilloscope.

3. Tektronix alleged that PWGSC improperly disqualified its bid for failing to provide documentation demonstrating compliance with the mandatory technical requirements of the RFP. Tektronix alleged that it had provided the necessary documentation through a link to a Web address. It also alleged that its oscilloscope met all the mandatory technical criteria and was less expensive than the one proposed in the winning bid. As a remedy, Tektronix requested that it be awarded the contract.

### BACKGROUND

4. The solicitation was issued on August 25, 2015, and the solicitation period ended on October 8, 2015.

5. On October 29, 2015, Tektronix was informed that its bid did not comply with all the mandatory requirements of the solicitation "... as it failed to provide adequate information in the bid package to validate the claims against the mandatory requirements without relying on external supplementary information".<sup>3</sup>

6. That same day, Tektronix filed an objection with PWGSC, indicating that it had provided a link to the required information in its bid. Tektronix argued that its oscilloscope met all the mandatory technical requirements and cost less than the one proposed in the winning bid.

7. On November 4, 2015, Tektronix spoke with the contracting authority who confirmed the decision to disqualify Tektronix's bid.

8. On November 17, 2015, Tektronix filed a complaint with the Tribunal.

### ANALYSIS

9. On November 20, 2015, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into this complaint. The reasons for that decision are as follows.

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].  
2. S.O.R./93-602 [*Regulations*].  
3. E-mail dated October 29, 2015.

10. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following four conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;<sup>4</sup>
- the complainant is an actual or potential supplier;<sup>5</sup>
- the complaint is in respect of a designated contract;<sup>6</sup> and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.<sup>7</sup>

11. Tektronix's complaint clearly meets the first two conditions. However, it is unclear at this stage whether Tektronix's complaint meets the third condition because DRDC itself is not a government entity or enterprise listed in the various schedules or annexes of the potentially applicable trade agreements.<sup>8</sup> Had Tektronix's complaint proceeded to the inquiry stage, the Tribunal would have sought submissions on the nature of the relationship between DRDC and the Department of National Defence, which is a listed government entity.

12. In any event, for the reasons discussed below, because Tektronix's complaint also fails to meet the fourth condition, namely, it does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements, the Tribunal will not conduct an inquiry into this complaint.

13. In conducting procurement inquiries, the Tribunal has repeatedly stated that it will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>9</sup>

14. It was a requirement of the RFP that bidders meet all the mandatory technical requirements<sup>10</sup> and provide documentation demonstrating compliance with those requirements.<sup>11</sup> In addition, the standard instructions<sup>12</sup> incorporated by reference into the RFP specified that Canada would only evaluate the

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4. Subsection 6(1) of the *Regulations*.

5. Paragraph 7(1)(a) of the *Regulations*.

6. Paragraph 7(1)(a) of the *Regulations*.

7. Paragraph 7(1)(a) of the *Regulations*.

8. Section 30.1 of the *CITT Act* defines "designated contract" as "... a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution..." and "government institution" as "... any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations". Subsection 3(2) of the *Regulations* provides that the name of a given government institution must appear in one or another of the various schedules or annexes contained in the trade agreements in order to fall within the Tribunal's jurisdiction.

9. *Excel Human Resources Inc. (operating as excelITR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 30; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 51; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at para. 10.

10. RFP, Section III, Articles 4.1.1.1 and 4.2.

11. RFP, Annex "A", Article 3.

12. Subsection 5(7) of the 2003 (2015-07-03) Standard Instructions – Goods or Services – Competitive Requirements provides that "... Canada will evaluate only the documentation provided with a bidder's bid. Canada will not evaluate information such as references to Web site addresses where additional information can be found, or technical manuals or brochures not submitted with the bid."

documentation provided with a bidder's bid and would not evaluate information, such as references to Web site addresses, technical manuals or brochures not submitted with the bid.

15. Tektronix does not dispute that it provided links to Web addresses where its data sheets and other technical information could be found instead of including copies of those documents with its bid.<sup>13</sup> Rather, Tektronix argues that the references to Web addresses should have been accepted by PWGSC and that, by disqualifying Tektronix's bid on this basis, PWGSC paid more money for an equally qualified product.

16. It is a bidder's responsibility to ensure that its proposal is compliant with all essential elements of a solicitation.<sup>14</sup> Accordingly, it is incumbent upon a bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant with all essential elements of a solicitation.<sup>15</sup> For its part, when evaluating a bid, the government institution must ensure that the bid thoroughly and strictly complies with the mandatory requirements identified in the tender documents.<sup>16</sup>

17. In the present complaint, while it may be true that Tektronix's product met the mandatory technical requirements of the RFP, Tektronix's bid failed to include the required documentation to demonstrate compliance in a manner consistent with the requirements of the RFP. As such, PWGSC had no choice but to declare Tektronix's bid non-compliant.

18. In light of the above, the Tribunal finds that the complaint filed by Tektronix does not disclose a reasonable indication that PWGSC did not conduct the procurement in accordance with the relevant trade agreements.

## DECISION

19. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Rose Ritcey  
Rose Ritcey  
Presiding Member

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13. Complaint form at 4.

14. *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para 16; *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

15. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

16. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA).