CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 12, 2000

File No.: PR-2000-010

IN THE MATTER OF a complaint filed by Thomson-CSF Systems Canada 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.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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Date of Determination:	October 12, 2000
Tribunal Member:	James A. Ogilvy, Presiding Member
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Gilles B. Legault John Dodsworth
Complainant:	Thomson-CSF Systems Canada Inc.
Counsel for the Complainant:	Richard A. Wagner Katherine A. Evans
Interveners:	BAE Systems Canada Inc. Oerlikon Aerospace Inc.
Counsel for the Intervener:	Richard A. Wagner Barbara McIsaac Kris Klein
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

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STATEMENT OF REASONS

On May 30, 2000, Thomson-CSF Systems Canada Inc. (Thomson) 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. F7018-9-0073/A) by the Department of Public Works and Government Services (the Department) of a Very High Frequency Digital Selective Calling (VHF DSC)/Global Maritime Distress and Safety System (GMDSS)[2] for Canada, including the "requirements for engineering, provision, installation assistance, testing, training and documentation", on behalf of the Canadian Coast Guard (CCG), a constituent of the Department of Fisheries & Oceans.

Thomson alleged that the Department failed to conduct this procurement in accordance with the provisions of the *Agreement on Internal Trade*,[3] in that it did not properly apply the requirements of article 4.17, "Equipment Redundancy", of the Technical and Operational Specification (the Specification) contained in the Request for Proposal (RFP), as clarified during the bidding period. As such, Thomson alleged that the Department improperly determined that its first proposal failed to meet the requirements of this article, while, on the other hand, concluding, in error, that Oerlikon Aerospace Inc. (Oerlikon) met them. Thomson further alleged that the Department also erred in concluding that the product offered in its second proposal was not an off-the-shelf, field-proven product. In addition, Thomson alleged that the Department improperly concluded that Oerlikon had experience in "similar" GMDSS projects, as was required by the RFP.

Thomson requested, as a remedy, that the contract awarded to Oerlikon be cancelled and that a new solicitation be conducted.

On June 6, 2000, 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] The Tribunal informed the parties that Oerlikon and BAE Systems Canada Inc. (BAE) had been granted intervener status in the matter on June 19 and July 6, 2000, respectively. On July 17, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian*

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. This system allows the Canadian Coast Guard to maintain a maritime distress watch utilizing its chain of radio stations.
3. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].

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International Trade Tribunal Rules.[5] On July 27, 2000, Oerlikon filed comments on the complaint with the Tribunal. That same day, Thomson and BAE filed comments on the GIR with the Tribunal. Both Thomson and BAE's comments were accompanied by affidavits signed by communications systems specialists. On August 4, 2000, the Tribunal requested that the Department clarify certain aspects of the GIR. On August 11, 2000, the Department provided the clarifications requested. On August 18, 2000, Thomson sent comments on the additional information to the Tribunal and, on August 23, 2000, filed additional comments.

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 September 15, 1999, the CCG sent a requisition to the Department for the procurement of a VHF DSC/GMDSS. A Notice of Proposed Procurement (NPP) for the requirement was posted on Canada's Electronic Tendering Service (MERX) on November 12, 1999. Three bid extensions were granted during the four-month solicitation period. During that period, eight amendments to the RFP were issued, addressing 95 questions from potential suppliers.

The following articles are relevant to this matter.

Article 7 of the RFP reads, in part:

> The Contractor is to provide the overall requirements for engineering, provision, installation assistance, testing, training and documentation for a Very High Frequency Digital Selective Calling (VHF DSC) Global Maritime Distress and Safety System (GMDSS) for Canada.

Article 20 of the RFP reads, in part:

> The Contractor shall deliver all items as specified in the Statement of Work for a VHF Digital Selective Calling System for the Canadian Coast Guard (SOW-001) Version E02 dated 15 October 1999.

Article 36 of the RFP indicates: "To be considered responsive, a bid must meet all of the mandatory requirements of this solicitation. Bids not meeting all of the mandatory requirements will be given no further consideration".

Article 37 of the RFP provides that "[t]he bidder's proposal will be evaluated as per Instructions to Bidders for the VHFDSC System for the Canadian Coast Version E01".

Article 2.8 of the "Instructions to Bidders" reads, in part: "The Crown reserves the right to ask for demonstrations of any equipment described by the Bidder as 'off the shelf', field proven".

Article 2.11 of the "Instructions to Bidders" provides that the bidder shall include "[e]xamples of similar projects that have been successfully completed by the Bidder elsewhere, including such items as project management techniques used, delays experienced, and cost escalations. Consideration will be given to Bidders who have successfully completed similar supply and installation projects".

5. S.O.R./91-499.

Article 3.1 of the "Instructions to Bidders" reads, in part: "The proposals will first be reviewed to verify compliance on all **mandatory** requirements (mandatory requirement are identified by the word "**shall**") and appear in the Technical and Operational Specification and the Statement of Work".

Article 1.1 of the Specification reads, in part:

> The system to be procured is referred to as the "DSC system" or "system" within this document.
>
> The work required of the Contractor to develop, produce and implement the system is identified within the Statement of Work (SOW) for the DSC system. Equipment, material and services to be supplied by the Contractor and those to be furnished by the Crown are also identified within the Statement of Work.
>
> This is not a developmental system specification. Only off-the-shelf, field proven systems, or integration of off-the-shelf, field proven systems, ***shall*** be acceptable.

Article 1.3 of the Specification reads, in part: "The equipment ***shall*** be installed at MCTS [Marine Communications and Traffic Services] Centres and their remote radio sites as listed in Annex D and detailed in Annex C. At each of the Centres there ***shall*** be two completely independent operator workstations, acting as main and standby. To achieve high availability, the Contractor ***shall*** supply dual transceivers tuned to channel 70 at the remote sites. Modems and associated equipment ***shall*** also be provided in dual redundant configuration. They ***shall*** be configured to work with communications equipment which may be available as detailed in ANNEX C".

Article 2.8 of the Specification reads, in part:

> All hardware parts and components ***shall*** be commercially available. The use of proprietary software or hardware ***should*** be minimized. Software ***shall*** be documented according to SOW 001 Section 9.7.
>
> In order to keep the system costs down the Contractor ***should*** utilize, to the greatest extent possible commercial "off the shelf" equipment.
>
> Commercial-off-the-shelf (COTS) items ***shall not*** be used beyond their published specification.

Article 4.7 of the Specification reads:

> Both main and standby DSC Radio Modems ***shall*** have the optional capability of controlling both the main or standby transmitter, and antenna switching shall be automatic. The main/standby control from the workstations ***shall*** be monitored and the Press To Talk (PTT) ***shall*** be controlled. When channel 70 is in use, the transmission ***shall*** hold off PTT until channel 70 is idle.

Article 4.17 of the Specification reads:

> The System design ***shall*** have sufficient built in redundancy to allow remote reconfiguration in the event of a transmitter or receiver failure. In addition:
>
> a) The failure of any single component ***shall*** not cause failure to the entire system; and
>
> b) The failure of any single component ***shall*** not cause the interface to any radio site to fail.

The following questions and answers are relevant to this matter.

Question 8: Figure 1 of the specification implies that the main standby switch will only allow the signal from the selected receiver/DSC modem to be relayed to the MCTS rather than the two signals from both the main and standby receivers. Is this the correct interpretation?

Answer 8: No. The combined signals from both receivers will be sent via the communications path to the MCTS centre.

Question 33: Ref Solicitation Amendment 001, Q & A 8

The government response to the question on Figure 1 was that the combined signals from both receivers will be sent to the MCTS centre. In this case, what is the function of the Main/Standby switch shown at the Remote Sites in Figure 1?

Answer 33: Figure one is a functional block diagram only. The main/standby switch in whatever form will or will not be used depending on the configuration of the Contractor's solution.

Question 34: Ref SPEC-001, Annex D, Figure 1

Remote sites serviced by landlines are shown with separate VHF receiver and transmitters and separate Rx and Tx antennas. What is the rationale for using this architecture rather than using VHF Tx/Rx radios as at the other remote sites? Are all remote sites serviced by landlines to have this architecture? Can VHF Tx/Rx radios be proposed as shown at the other remote sites in Figure 1 with a single Tx/Rx Antenna?

Answer 34: Again, Figure one is a functional block diagram only. The different configurations depicted are just samples of what different Contractors may propose. For example, the remote site configurations could all/some be as shown in the top illustrations, or all/some as shown in any of the other illustrations, or different altogether. One supplier of VHFDSC systems uses the configuration shown in the bottom illustration (separate tx and rx antennas) in order to sample the transmitted signal for health purposes.

Question 68: SOW para 4.5.5.2 Training

2nd article "After CCG delivers two systems…as detailed in section 7"

By "systems" does CCG mean MCTS installations or remote sites or combination thereof. There is an apparent conflict of terminology at various points in the documentation with regard to the term system. Please confirm what is intended by the term.

Answer 68: In this case, CCG will transport two MCTS Centre equipment suites along with their remote sites' equipment to the training site. In other parts of the documentation, the term system should be taken in context since the [overall] systems are made up of other "systems". One exception is the Laurentian Region where only one system will be used.

Six proposals were received from five bidders, including two proposals from Thomson. Thomson's first proposal was based on DSC equipment from Secmat NT (the first proposal). The second proposal was based on DSC equipment from Thrane & Thrane (the second proposal).

According to the GIR, the technical proposals were submitted to the CCG for technical evaluation purposes. Over a two-week period, a team of five operational and technical persons from the regions and headquarters of the CCG, with the assistance of one officer from the Department, evaluated the bids following the RFP guidelines.

Two proposals were found to be fully compliant, including Oerlikon's proposal. Four proposals were found to be non-compliant with the mandatory requirements of the solicitation documents, including Thomson's first and second proposals.

Thomson's first proposal was found to be non-compliant for failing to meet the mandatory requirements set out in articles 4.7 and 4.17 of the Specification. Thomson's second proposal was also found to be non-compliant, as it included software being developed, and not commercially available, at the time of bid closing.

On May 4, 2000, the contract was awarded to Oerlikon, the supplier that offered the highest ratio of technical and management rated points to price. On May 8, 2000, letters of regret were sent to all other bidders. On the same day, a request for a debriefing was received from Thomson. The debriefing took place on May 16, 2000, at which time Thomson was informed of the strengths and weaknesses of its proposals.

POSITION OF PARTIES

Department's Position

In response to Thomson's allegation that answers to questions 8, 33 and 34, which constitute parts of the solicitation amendments, "relaxed the original RFP requirement that there be no single point of failure" in the equipment to be supplied by the contractor, the Department submitted that the amendments to the solicitation did not modify the requirement for redundancy in the contractor-furnished equipment under article 4.17 of the Specification. These questions, the Department submitted, were not directed at the redundancy requirement in article 4.17. Rather, they were seeking clarification of the functional block diagram illustrated in Figure 1 of Appendix D to the Specification. The role of functional diagrams, the Department argued, is merely to illustrate the functions that must be performed by the VHS DSC system, without offering the technical means by which those functions are achieved.

The Department further submitted that, pursuant to article 4.17 of the Specification, only the equipment to be supplied by the contractor required sufficient redundancy to avoid a single point of failure. In this context, the Department added that the question whether the entire VHF DSC system, including the government-furnished components of the GMDSS, includes a single point of failure was not relevant to the redundancy requirement imposed on contractor-furnished equipment in the Specification.

The Department further submitted that a description of the equipment listed in Annex C of the Specification, under the heading "Site Mux Data Port", shows that the contractor-furnished equipment must interface with a single data port on the CCG-furnished equipment. This is confirmed by answer to question 8 and is noted in Thomson's complaint. The Department submitted that the requirement at article 4.17 of the Specification had to be interpreted in harmony with the above requirement.

The Department argued that the fact that Thomson could not design a system to satisfy the technical specification of the solicitation did not mean that such a system was technically impossible. It simply meant that the system design used by Thomson, in its first proposal, did not meet those requirements. The Department asserted that, contrary to Thomson's allegation, the Specification did not limit bidders to using simple "Exclusive Or" arrangements, as illustrated on page 3 of the complaint. For example, the Department submitted that Thomson could have used "intelligent switches", e.g. routers, and, in fact, Thomson proposed such a solution in its second proposal. The Department further acknowledged that "a properly designed and configured router-based architecture would have satisfied the redundancy requirements of Article 4.17 of the Specifications".

The Department indicated that Thomson's first proposal was declared non-responsive because it failed to meet two mandatory requirements contained in articles 4.7 and 4.17 of the Specification. The Department asserted that Thomson's first proposal failed to provide the mandatory automatic

cross-switching between the DSC modems and the transmitters, as required by article 4.7. In fact, the Department submitted, when asked to clarify its proposal on this point, Thomson indicated that the requirement was satisfied by pulling the connecting cable from one modem and plugging it into the other modem. The Department added, with respect to Thomson's explanation, that the solution that it proposed in respect of article 4.7 was conditioned by the redundancy requirements of article 4.17, that a properly integrated "fail-safe switching system" would have avoided this conundrum. In fact, the Department noted that, in its second proposal, Thomson used such an approach with equipment from a different manufacturer. In light of the above, the Department submitted that it was justified to declare Thomson's first proposal non-compliant for failing to meet the mandatory requirements of either article 4.7 or article 4.17.

With respect to Thomson's second proposal, the Department submitted that it was declared non-compliant because, contrary to the provisions of article 1.1 of the Specification, it proposed to use a non-commercially available, off-the-shelf software. In fact, the Department submitted that Thomson proposed to use software that was still being developed and unavailable at the time of bid closing. The Department, citing the Supreme Court of Canada[6] and referring to Article 1015(4)(a) of the *North American Free Trade Agreement*,[7] argued that the conditions of article 1.1 had to be met by bidders as of the time of bid closing.

With respect to the requirement that bidders possess experience with and personnel versed in "similar" projects, the Department submitted that the solicitation documents did not impose, as a mandatory or "qualification" requirement, that bidders have experience with identical projects, as argued by Thomson. Rather, the Department submitted, management information and a bidder's experience with similar projects were part of the rated requirements of the RFP. Bidders that could demonstrate better management of and experience with similar projects were awarded a higher score for these aspects of their proposals. Although article 2.11 of the "Instructions to Bidders" made it mandatory for bidders to submit information on similar projects, the RFP did not make the evaluation of that information a mandatory criterion of the RFP. The Department submitted that no bidder's proposal could be disqualified on this basis, as there was no minimum point requirement set out in the RFP for this evaluation factor. In the circumstances, weaker proposals on this point merely scored fewer points, thus affecting the bidder's chances to be successful.

The Department asked for its complaint costs and, in the alternative, reserved the right to make further submissions with respect to the award of costs in this matter.

In answering the Tribunal's request for clarifications, the Department submitted that the word "system", as used in article 4.17 of the Specification, must be interpreted with reference to article 1.1. Article 1.1 provides that the system to be procured, i.e. the equipment to be supplied by the contractor, is called the "system" within the Specification. As article 4.17 provides that the "system" must have built-in redundancy, the Department submitted that this provision requires only that the equipment to be supplied by the contractor have built-in redundancy. The Department added that the Specification was specifically written this way so that, in the event that international agreements required upgrades to Canada's VHF DSC/GMDSS, the only upgrades required would be to the existing CCG infrastructure.

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6. *The Queen (Ont.)* v. *Ron Engineering*, [1981] 1 S.C.R. 111 at 121.
7. 32 I.L.M. 289 (entered into force 1 January 1994).

With respect to the issue of the "availability of COTS software at the time of bid closing", the Department submitted, citing the Tribunal's determinations in File Nos. PR-96-021[8] and PR-95-001,[9] that the compliance of a proposal to the mandatory requirements of the solicitation documents must be determined at the time of bid closing. Therefore, the Department submitted, because the software proposed in Thomson's second proposal required further development at the time of bid closing, it did not meet the mandatory requirement for COTS software. Furthermore, the Department submitted that pursuant to article 2.8 of the "Instructions to Bidders", for the software in Thomson's second proposal to be properly demonstrated, it had to be fully functional and require no further development at the time of bid closing. Similarly, the Department argued that article 3.3 of the Specification imposed, as a mandatory requirement, that the proposed software be capable of performing several functions, which requirement, according to the Department, pursuant to the Tribunal's determinations in *Mechron* and *London Photocopy*, had to be met at the time of bid closing.

Finally, the Department provided a detailed diagram of the proposed systems in Oerlikon's proposal and in Thomson's first proposal and explained why the former met the requirements of article 4.17 of the Specification, while the latter did not.

Oerlikon's Position

Oerlikon submitted that the CCG requirement that the system provided by the contractor contain no single point of failure (often referred to as a redundant system) is a clear requirement of the RFP which is legitimate and attainable. Specifically, Oerlikon submitted that article 4.17 of the Specification is clear and that the CCG's answers to questions 8, 33 and 34 in no way modified this requirement. The answers provided clarification only. Oerlikon further submitted that Thomson was aware that the requirement remained unchanged and chose, perhaps for price considerations, not to clarify its proposal in line with this requirement.

Oerlikon added that, considering the importance and purpose of the GMDSS, the redundancy requirement is legitimate. Noting that, by providing a single point of interface, it may be that the Government Furnished Equipment (GFE) is not a redundant component, Oerlikon submitted that the redundancy status of the GFE is immaterial to whether the system provided by the contractor meets the redundancy requirement. In addition, Oerlikon submitted that the requirement is attainable with a simple and generic intelligent switching configuration, such as the one that it offered in its proposal.

With respect to the COTS issue, Oerlikon submitted that the RFP was clear and required that the proposed software be field-proven. In this context, Oerlikon submitted, the CCG and the Department were within their right to declare the converted software package offered by Thomson non-compliant and, absent a violation of the AIT, the Tribunal does not have the jurisdiction to go behind the CCG's and the Department's decisions on this point.

With respect to the question of the demonstration of "similar" experience, Oerlikon argued that it has demonstrated to the Department and CCG's satisfaction that it possesses such experience and that it is not within the Tribunal's jurisdiction to reevaluate Oerlikon's proposal. Furthermore, Oerlikon submitted that Thomson's interpretation of the term "similar" to mean "identical" is totally without merit. Such interpretation, Oerlikon submitted, would be trade restrictive and would violate the terms of the AIT. In any

8. *London Photocopy* (7 February 1997).
9. *Mechron Energy* (18 August 1995) [hereinafter *Mechron*].

event, Oerlikon concluded, the requirement to demonstrate similar experience is not a mandatory requirement; rather, it is a rated criterion.

Thomson's Position

Thomson submitted that the solicitation breached Article 506(6) of the AIT, in that it contained a requirement impossible to achieve or, alternatively, that the requirements of the RFP were modified, ambiguous or made ambiguous by the Department and that it was improper to disqualify Thomson's proposal on this basis.

Thomson submitted that article 4.17 of the Specification imposes three mandatory requirements, namely: (1) built-in redundancy; (2) no failure of the entire system caused by the failure of a single component; and (3) no failure of the interface to any single radio site caused by the failure of any single component. This combination of requirements, Thomson submitted, is impossible to achieve, particularly considering the requirement that the bidder's proposed system must interface with a single customer-supplied (the RS-232[10]) port.

Thomson did not dispute, as was asserted by the Department, that, generally speaking, it would be possible to interface with a single data port by using intelligent switches; however, this is not possible where the single data port is an RS-232 interface, as is the present case. Thomson submitted that the Department, in the GIR, addressed the issue of redundancy only in a general manner, not specifically within the context of an RS-232 interface, and, therefore, has provided no evidence to support the claim that the redundancy requirement of the RFP was possible to fulfil.

Furthermore, Thomson submitted that the Department's responses to questions 8, 33 and 34, in combination with the technical impossibility of meeting such specifications, altered the RFP by modifying the requirement or introducing an ambiguity as to the mandatory nature of the requirements contained in article 4.17 of the Specification. Thomson added that its interpretation of the Department's responses to the above-mentioned questions was reasonable in the circumstances and that, therefore, its proposal should not have been disqualified on that basis.

With respect to the requirements in article 4.7 of the Specification, Thomson submitted that it designed the system in both of its proposals to best meet the requirements of high reliability for the system and, to the greatest extent possible, to comply with the redundancy and no single point of failure requirements. Thomson submitted that it is, therefore, improper to rule as non-compliant a transmitter control system that achieves the overall functional requirements of transmitter control and maximum system reliability, on the basis that such transmitter requirements are inconsistent with the requirement for no single point of failure. Thomson submitted, in respect of article 4.7 that the transmitter control feature is not constrained by the CCG-imposed requirement to interface to a single RS-232 communications device. It is, however, dependent on the interfaces with the hardware around which the overall system is designed.

Thomson submitted that the RFP, as amended by the questions and answers during the bidding process, required that two modems be incorporated into the GMDSS as main and standby and that the GMDSS interface to a single customer-supplied RS-232 port from only one modem at a time. As set out

10. The RS-232 is an industry standard that relates to data communications, whereby information is transmitted from one device (the transmitter) to another device (the receiver). The RS-232 is a single-ended, point-to-point data transmission system, which is capable only of receiving data via a single wire and cannot receive signals from more than one source at a time. See Thomson's comments on the GIR at para. 15.

above, Thomson submitted, this requirement would require a switching device, combiner or multiplexer, any of which would constitute a single point of failure for the GMDSS, even if redundant devices were proposed. In this context, Thomson submitted that the Department's request for clarification (question 14) and Thomson's answer thereto should reasonably be interpreted to demonstrate that the Department did not fully comprehend the inconsistencies in the requirements of the RFP at the time of reviewing the bids. The Department indeed failed to understand that the addition of a second multiplexer (also called TDM Mux) and a switch only move the single point of failure from the multiplexer to the switch. Thomson argued that it is technically impossible for the GMDSS proposed by Oerlikon to have been in compliance with all the mandatory requirements of the RFP, particularly that of the single RS-232 interface port/no single point of failure.

With respect to the COTS issue, Thomson submitted that the requirement that proposals include COTS equipment was inconsistently referenced in the RFP and throughout the questions/answers as sometimes being mandatory and other times desirable and that, on this basis, it was reasonable for Thomson to interpret the requirement as desirable. Thomson noted that the software to be ported to Windows NT, and for which its second proposal was rejected, is currently in operation in about 40 countries around the world, representing about 40 percent of the world market. Furthermore, Thomson submitted that "development" contemplates analysis and design changes to a product. Merely changing the platform on which a software product operates does not, Thomson argued, constitute development, since it makes no change to the functionality of the software itself. It is merely adaptation to address the customer's host platform preferences and is a common occurrence in the software industry.

With respect to the experience requirements at articles 2.10 and 2.11 of the RFP, Thomson contended that bidders, without the experience referred to in the said articles, should not have been considered for award. Indeed, Thomson submitted, the term "similar" taken literally means "having characteristics in common; strictly comparable; alike in substance or essentials; not differing in shape, but only in size or position; the possibility of being mistaken for each other; and a marked likeness".[11] Therefore, Thomson, submitted bidders without experience in the implementation of a GMDSS would be unable to meet the mandatory requirement to provide demonstrated experience and résumés of personnel possessing such experience.

In its comments on the public version of the additional information, Thomson submitted that the Department has failed again to reconcile the requirement in article 4.17 of the Specification for no single point of failure to exist within the system to be procured from the contractor. Thomson argued that this is the requirement which is technically impossible to meet. With respect to the COTS issue, Thomson submitted that the Department has failed to identify any article or item of the RFP which required COTS software to be available at the time of bid closing. Moreover, Thomson submitted that the Department's justification based on previous Tribunal decisions is untenable. To accept this submission, Thomson argued, would create an unreasonable obligation for contractors to obtain legal opinions as to the compliance of their bids with previous jurisprudence prior to submissions for evaluation. Thomson reiterated that, in any event, the software that it proposed met the requirements of the RFP at the time of bid closing.

With respect to the Tribunal's third question, Thomson submitted that the Department's response was non-responsive to the Tribunal's request for clarification, since it offered no assistance over and above the information already provided by Oerlikon in its proposal. Thomson made submissions on Oerlikon's proposal by identifying and describing a single point of failure in its proposed system.

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11. See Thomson's comments on the GIR at para.72.

In its final comments of August 23, 2000, Thomson referred the Tribunal to articles 40 to 42 of its comments on the GIR with respect to why its first proposal did not meet the requirements of article 4.17 of the Specification. Thomson further submitted that the Department had failed to prove that a system was or could have been proposed which would satisfy all the requirements of the RFP, particularly the requirement for no single point of failure.

BAE's Position

BAE indicated that it fully supports Thomson's complaint, particularly in relation to its submission that the requirements of the RFP were technically impossible to meet. BAE submitted that the inclusion of two separate channels into the CCG multiplexing equipment was the only architecture which could be compliant with the requirements of articles 1.3 and 4.17 of the Specification, because the point at which the switchover of the two redundant systems to a common multiplexer feed occurs would become a safety critical single point of failure. In addition, the ongoing connection to the multiplexer would also constitute a single point of failure. BAE submitted that, in the aircraft industry, only end-to-end dual redundant systems are deemed able to meet the safety requirement of no single point of failure. BAE supported Thomson's contention that the Department amended the mandatory nature of the requirements in article 4.17 of the Specification in its answer to question 34. Indeed, BAE submitted, the Department's answer to question 34 could only have been interpreted as implying a willingness to accept alternative configurations, which would not meet the requirement to provide a single line into the government interface.

In summary, BAE fully supported Thomson's contentions that the solicitation requirements were unclear and flawed by technical impossibility, that the bids submitted in response to the RFP were improperly evaluated and that the contract should be cancelled and the requirement re-opened for procurement.

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 further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the provisions of the AIT.

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".

The Tribunal will decide whether certain provisions of the RFP and clarification answers relating thereto clearly identified the requirements of the procurement; whether, in respect of those provisions, they were clearly identified as mandatory or desirable in the solicitation documents; and whether, in evaluating Thomson's first and second proposals and Oerlikon's proposal in response to this solicitation, the Department and the CCG conformed to the rules set out in the RFP and related documents.

The Tribunal notes that article 36 of the RFP clearly indicated that, to be deemed responsive and to be considered for award, proposals had to meet all the mandatory requirements of the RFP. The Tribunal is also satisfied that, to be responsive, proposals had to meet the requirements of article 4.17 of the Specification, particularly in light of the answers that the Department provided to questions 8, 33 and 34.

Thomson alleged that, in the circumstances of this case, the Department's answers to questions 8, 33 and 34 must, of necessity, be interpreted as a relaxation of the requirements in article 4.17; otherwise, a technical impossibility emerges. The Department disputes this allegation, submitting that the above-mentioned answers clarified the purpose of the functional block diagrams in Appendix D to the RFP.

The Tribunal finds that the answers to questions 8, 33 and 34 did not relax the provisions of article 4.17 of the Specification, which required that: (1) the system design proposed by potential suppliers have sufficient built-in redundancy and have no single point of failure; and (2) that the failure of any single component not cause the interface to any radio site to fail. The Tribunal is satisfied that the Department's answers to question 8 and, in particular, to questions 33 and 34 clarified that the functional block diagrams were meant to convey to potential suppliers the CCG's requirements, without prescribing any particular or specific approach or solution to meeting such requirements. In the Tribunal's opinion, these answers, in no way, addressed the contents of the statement of requirement proper.

Thomson further alleged that the technical impossibility referred to in its complaint lies fundamentally in the requirement that the systems proposed by bidders must interface with a single customer-supplied RS-232 port. For its part, the Department asserted that this fact is irrelevant, as only the equipment to be supplied by the contractor must have built-in redundancy and no single point of failure. The Department based this contention on article 1.1 of the Specification, which defines the word "system" for purposes of the Specification, including article 4.17, as meaning "the system to be procured", as opposed to the GMDSS in its entirety, which comprises contractor-provided equipment and GFE. Because the RS-232 is part of the GFE, the fact that it may constitute a single point of failure is irrelevant to deciding whether the systems proposed by bidders meet the requirements of article 4.17.

The Tribunal finds that the word "system" in the context of article 4.17 of the Specification means the system to be provided by the contractor and does not include or extend to the GFE. The Tribunal notes that the Department's answer to question 68, which forms part of the solicitation documents, indicated that, generally, "the term system should be taken in context". In the Tribunal's opinion, the most relevant definition of the term "system" in the context of article 4.17 of the Specification is found at article 1.1, which reads, in part: "The system to be procured is referred to as the 'DSC system' or 'system' within this [Specification]" [emphasis added]. The Tribunal, therefore, concludes that the term "system", as used in article 4.17, refers only to the system to be procured, not to the GFE which, by definition, has already been procured and is in the CCG's possession.

Having determined that the Department did not relax the requirements in article 4.17 of the Specification through the question and answer process and having also determined that the requirements in article 4.17 extend only to the system to be provided by the contractor, which does not include the RS-232 port, the Tribunal concludes that Thomson has not established that the requirements of article 4.17 were technically impossible to achieve. Therefore, the Tribunal finds that the Department acted in accordance with the AIT when it disqualified Thomson's first proposal for failing to meet the requirements of article 4.17. The Department and the CCG found that the solution proposed by Thomson, in its first proposal, could not achieve remote reconfiguration in the event of failure of a transmitter or receiver. In any event, this point need not be belaboured, since Thomson's complaint rests on the very proposition that the Specification was impossible to achieve.

The Tribunal, in the absence of the technical impossibility alleged by Thomson, also finds that there is no basis to Thomson's complaint that the Department and the CCG improperly qualified Oerlikon's proposal. The alleged technical impossibility advanced by Thomson was clearly based on the requirement to interface with the single government-furnished RS-232 port which, of necessity, created a single point of

failure in the system, as this term was construed by Thomson. In the Tribunal's opinion, the issue, however, disappears when the term "system", as it appears in article 4.17 of the Specification, is interpreted to mean "the system provided by the Contractor" only, as the problematic RS-232 port falls outside the system being procured.

With respect to Thomson's allegation that Oerlikon does not possess the required "similar" GMDSS experience or personnel with the required experience to qualify for this solicitation, the Tribunal finds that there is no merit to this allegation. In the Tribunal's opinion, article 2.11 of the "Instructions to Bidders" makes it clear that consideration will be given to bidders that have successfully completed similar supply and installation projects, including such items as project management techniques used, delays experienced and cost escalations. The provision is clearly not mandatory and, just as clearly, does not require that bidders and proposed employees have experience in successfully completing "identical" supply and installation projects. In the Tribunal's opinion, Thomson has produced no evidence whatsoever to support its contention that the only acceptable experience was that acquired in successfully completing identical GMDSS projects. Nor has Thomson produced evidence that failure of a supplier's proposal to meet this requirement or to propose personnel meeting this requirement would necessarily result in anything more than such a proposal obtaining a score of zero against this requirement. Although this could significantly compromise a bidder's chances to be successful, this would not render its proposal non-compliant or non-responsive to the requirements of the RFP.

The Tribunal must finally address Thomson's allegation that its second proposal was improperly declared non-responsive for failing to propose an off-the-shelf, field-proven system. Although Thomson indicated, in its submission, that the Department was incapable of citing any provision of the RFP requiring that the system proposed be "COTS as of the time of bid closing", this argument was not made by Thomson in its complaint. Rather, Thomson argued that the system that it proposed in its second proposal was not developmental in nature, as the functionality of the system that it proposed existed in DOS,[12] and was in use in some 40 different countries and represented about 40 percent of the market for such systems as of the time of bid closing. All that was required, Thomson submitted, was a mere adaptation to address the CCG's host platform preferences that required porting to Windows NT.

With regards to its second proposal, Thomson has argued that the system that it proposed is not a developmental system, in that the functionality of the system already existed in DOS and required only adaptation to run on Windows NT. However, what is clear to the Tribunal is that Thomson never asserted that the system that it proposed, in its second proposal, was an off-the-shelf system. Rather, it argued that the system was off-the-shelf and field-proven in DOS and merely had to be adapted to be available to run on Windows NT. In the Tribunal's opinion, because Thomson never represented that the system that it proposed, in its second proposal, was off-the-shelf and because, using the very words of Thomson, it required "adaptation", it was reasonable for the Department to conclude that it was not an off-the-shelf, field–proven, commercially available system.

Thomson further alleged that the requirement that the equipment and software proposed by bidders be COTS was inconsistently referenced in the RFP and through the question and answer process sometimes as being mandatory and at other times as being desirable and that, on this basis, it was reasonable to interpret the requirement as desirable. Article 2.8 of the Specification required contractors to utilize, to the greatest extent possible, commercial "off-the-shelf" equipment. This, Thomson alleged, introduced some ambiguity as to whether the requirement was mandatory. On the other hand, the requirement that the proposed system be an off-the-shelf, field-proven system or integrate an off-the-shelf, field-proven system was stated in

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article 1.1 of the Specification as follows: "This is not a developmental system specification. Only off-the-shelf, field proven systems, or integration of off-the-shelf, field proven systems ***shall*** be acceptable" [emphasis added]. The word "shall" is in boldface and italics in the article and, according to the provision of article 3.1 of the "Instructions to Bidders", this denotes a mandatory requirement. In the Tribunal's opinion, the requirement that the proposed system/software not be of the developmental type was clearly stated as a mandatory requirement of the RFP. Furthermore, to the extent that an element of ambiguity, as perceived by Thomson, existed, in the Tribunal's opinion, the alleged ambiguity was immediately perceptible and Thomson was not free to adopt a particular interpretation rendering a requirement of the RFP, obviously identified as mandatory, inoperative without first seeking a clarification from the Department. For obvious fairness and transparency reasons, bidders are not free to make such decisions unilaterally without the other bidders' knowledge and without the Department's consent.

The Tribunal is also satisfied that the requirement that the system proposed by bidders be "off-the-shelf, field proven" had to be met as of the time of bid closing. Although this could have been expressed more clearly in the solicitation documents, when read as a whole, the provisions of the RFP support such an interpretation. In particular, in the Tribunal's opinion, article 2.8 of the "Instructions to Bidders" makes this point clearly.

For the above reasons, the Tribunal finds that the Department acted properly when it declared Thomson's second proposal non-responsive for failing to propose an off-the-shelf, field-proven system as of the time of bid closing.

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 Thomson.[13] Therefore, submissions on this matter are not necessary, and no costs will be awarded.

DETERMINATION OF THE TRIBUNAL

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

James A. Ogilvy
James A. Ogilvy
Presiding Member

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