

Ottawa, Tuesday, September 26, 2000

File No.: PR-2000-018

IN THE MATTER OF a complaint filed by Xwave Solutions 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.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be issued at a later date.

Date of Determination: September 26, 2000
Date of Reasons: October 12, 2000

Tribunal Member: Peter F. Thalheimer, Presiding Member

Investigation Manager: Paule Couët

Counsel for the Tribunal: Philippe Cellard

Complainant: Xwave Solutions Inc.

Counsel for the Complainant: Eric R. Williams

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater

Ottawa, Thursday, October 12, 2000

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IN THE MATTER OF a complaint filed by Xwave Solutions 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 June 28, 2000, Xwave Solutions Inc. (Xwave) 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. W8474-9-HC02/A) by the Department of Public Works and Government Services (the Department) for the provision, installation and support of a Security and Military Police Information System (SAMPIS) that includes occurrence management and computer-aided dispatch capabilities for the Department of National Defence (DND).

Xwave alleged that the Department did not properly interpret the requirement of section 3.3.1.1, entitled "Current Field Installations", of the Statement of Work (SOW) relating to the fielding experience of the OMS/CAD (Occurrence Management System/Computer-aided Dispatch) software. Xwave submitted that, in this section, the expression "OMS/CAD" should have been interpreted to mean: (1) OMS or CAD; or (2) OMS and/or CAD. Xwave disagreed with the Department's interpretation of the expression "OMS/CAD" as meaning an integrated OMS and CAD system. Xwave further submitted that the Department's interpretation would favour one specific product and that this would be contrary to Article 504(3) of the *Agreement on Internal Trade*.²

Xwave requested, as a remedy, that, if a contract has been awarded, it be terminated, that its proposal be deemed compliant and that it be awarded the contract. In the alternative, Xwave requested that a new solicitation be ordered, directing that the expression "OMS/CAD" therein be interpreted as meaning "OMS or CAD" or "OMS and/or CAD". In the further alternative, Xwave requested to be compensated by an amount to be determined at a later date. Xwave also requested its reasonable costs incurred in preparing a response to the solicitation and for filing and pursuing this complaint.

On July 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*.³ On August 1, 2000, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On August 16, 2000, Xwave filed comments on the GIR with the Tribunal.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
3. S.O.R./93-602 [hereinafter Regulations].
4. 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 August 2, 1999, the Department received advance notice of a request for the specification, acquisition, fielding and operational support of a commercial off-the-shelf (COTS) software system that would include an OMS and, where practical for operational control, a CAD system, in order to meet the requirements of the Canadian Forces Provost Marshal.

On September 1, 1999, a formal requisition for an OMS/CAD system was received by the Department. A Notice of Proposed Procurement (NPP) and related Request for Proposal (RFP) were posted on Canada's Electronic Tendering Service (MERX) and in *Government Business Opportunities* on December 10, 1999, with a closing date of January 20, 2000. The NPP and the RFP indicated that the *North American Free Trade Agreement*,⁵ the AIT and the *Agreement on Government Procurement*⁶ applied to this solicitation.

The RFP, as amended, included the following:

PART II – PROPOSAL PREPARATION INSTRUCTIONS AND EVALUATION CRITERIA

C.5 BID EVALUATION (M)

C.5.2 ALL BIDDERS ARE HEREBY ADVISED THAT FAILURE TO PROVIDE ALL OF THE INFORMATION REQUESTED, TO THE DEGREE SPECIFIED AND IN THE MANNER INDICATED, SHALL RESULT IN THEIR PROPOSAL BEING ASSESSED AS NON-COMPLIANT.

C.10. EVALUATION PROCESS:

C.10.1 PHASE I – TECHNICAL EVALUATION; MANDATORY CLAUSES/ARTICLES/ TERMS AND CONDITIONS:

(1) In order to be considered technically compliant, Bidders must meet all mandatory requirements contained in this RFP document, including any or all Annexes and appendices.

C.10.3 PHASE III – BASIS OF SELECTION OF THE “BEST VALUE” PROPOSAL

(1) Only compliant proposals meeting all mandatories of the RFP and its annexes and appendices will be considered at this point.

Section 1.1 of the SOW, which is Annex A to the RFP, reads:

The purpose of this project is to specify, acquire, field, and operationally support, a commercial off-the-shelf software system that provides the occurrence management capability, including computer-aided dispatch, that meets the requirements of the Canadian Forces Provost Marshal.

Section 3.1 of the SOW reads, in part:

SAMPIS is primarily a hardware/software acquisition project. The delivered solution shall be an integrated commercial off-the-shelf (COTS) system.

5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].

Section 3.1.1 of the SOW reads, in part:

The SAMPIS project will ultimately provide a system with the following functional capabilities:

- b) An Occurrence Management System (OMS);
- d) A Computer-Aided Dispatch (CAD) system integrated with the OMS.

Section 3.2.1.1 of the SOW reads, in part:

The Contractor shall:

- a) Provide an existing in-service COTS software package that must, as a minimum, include the following capabilities:
 - OMS (in accordance with the Requirements Specification – Appendix 7);
 - CAD, integrated with OMS (in accordance with the Requirements Specification – Appendix 7).

Section 3.3.1.1 of the SOW reads:

Each bidder's proposal shall include documentary evidence that the OMS/CAD software has been successfully fielded in at least three other police agencies, at least two of which are in Canada. Names, addresses and telephone numbers for at least three current Canadian/U.S. references, which the PM [Project Manager] SAMPIS may contact during bid evaluation, are to be included with the proposal.

Section 3.3.1.2 of the SOW reads, in part:

For bidders that propose a system configuration that is based on the first-time integration, in the policing environment, of a collection of COTS components, the bidder shall provide experiential evidence of the bidder's system design and integration capability.

Section 3.3.3.4.1 of the SOW, on the OMS software, reads:

The programs supplied in the COTS package to perform the various requirements of the SAMPIS - OMS must be able to demonstrate records of exhaustive testing to ensure a high degree of reliability. In addition, these programs must be independent of upgrades to the operating system and other system software.

Section 3.3.3.5.1 of the SOW, on the CAD software, reads:

The programs supplied in the COTS package to perform the various requirements within the SAMPIS - CAD must be able to demonstrate records of exhaustive testing to ensure a high degree of reliability. In addition, these programs must be independent of upgrades to the operating system and other system software.

Section 3.4.4 of the SOW specifies the five project management stages to be employed to manage the development of the SAMPIS and to track the deliverables as follows: Stage A, Preliminary Design; Stage B, Detailed Design; Stage C, Implementation and Integration; Stage D, System Acceptance Test; and Stage E, In-Service.

By bid closing date of February 15, 2000, three proposals had been submitted by three bidders, including one from Xwave. The Department and DND determined that the proposal submitted by Xwave was non-responsive, as it failed to comply with the mandatory requirements of section 3.3.1.1 of the SOW. The other two proposals received were deemed technically compliant. On June 14, 2000, a contract in the amount of \$7,211,493.98 was awarded to MacDonald, Dettwiler and Associates Ltd., and the other bidders

were notified. On June 20, 2000, a debriefing was held with Xwave to review its proposal. On June 28, 2000, Xwave filed this complaint with the Tribunal.

POSITION OF PARTIES

Department's Position

The Department submitted that, contrary to Xwave's allegation, the OMS and CAD system were not required to be found in a single integrated product. Rather, the final product or "delivered solution" had to be an integrated COTS software system. This position, the Department submitted, is supported by the text of sections 3.3.3.4.1, 3.3.3.5.1 and 3.3.1.2 of the SOW, requesting evidence of system design and integration capability and experience, and by items 3 and 4 of Annex C to the RFP, allowing separate licence fees for both the OMS and CAD software proposed.

Furthermore, the Department submitted that Xwave's allegation that Versaterm is the only software system capable of meeting DND's requirement is based on an erroneous interpretation that the RFP required bidders to propose a single system that integrated the OMS and CAD software. As the industry survey and further work by DND revealed, several manufacturers produce OMS or CAD software that is not integrated with a counterpart CAD system or OMS and that apparently meets the COTS and other requirements of the solicitation documents.

The Department submitted that, within the context of the SOW, the expression "OMS/CAD" is properly interpreted to mean "OMS and CAD". The Department noted that Xwave itself used this interpretation in its proposal. Moreover, the Department submitted that Xwave was aware of the requirement to provide examples of both its OMS and CAD software being successfully fielded in at least three other police agencies. In fact, it provided at least 19 examples of current installations of its CAD software and three examples of current installations of its OMS software. However, two of its OMS examples did not meet the requirements of the SOW.

With respect to Xwave's allegation that the expression "OMS/CAD" is properly interpreted as "OMS or CAD" or "OMS and/or CAD", the Department submitted that, under these interpretations, the requirement for a bidder to provide "documentary evidence that the OMS/CAD software has been successfully fielded in at least three other police agencies" may be satisfied without any evidence that the OMS has been successfully fielded in at least three other police agencies and that the OMS is a COTS product. The Department argued that this interpretation is simply not reasonable.

The Department added that Xwave bore the onus of ensuring that its proposal was compliant with the mandatory requirements of the RFP. As well, it bore the responsibility of seeking clarification of any alleged ambiguity with respect to the meaning of section 3.3.1.1 of the SOW. The Department argued that, as Xwave is alleging that the expression "OMS/CAD" in section 3.3.1.1 is inconsistent with every other use of the expression in the solicitation documents, such an alleged inconsistency should have been brought to the attention of the contracting officer. The Department observed that, although 105 questions were raised by bidders and were answered by the Department and DND during bid preparation, no bidder sought clarification on the meaning of "OMS/CAD". As well, all bidders, including Xwave, provided the three examples requested at section 3.3.1.1. However, only one of the examples provided by Xwave complied with the requirements of the SOW.

Given the circumstances of this case, the Department requested its complaint costs.

Xwave's Position

Xwave submitted that its position, i.e. that the Department required evidence of successful fielding of a single system integrating an OMS and a CAD system, comes from documents produced by DND and the Department at the debriefing of June 20, 2000. Those documents emphasized that the prior fielding references that Xwave put forward in its proposal did not document an integrated CAD system.

Xwave firmly maintained that Versaterm is the only product which meets the technical specifications and the fielding requirements of section 3.3.1.1 of the SOW, as allegedly interpreted by the Department (i.e. two successfully fielded integrated OMS and CAD system in Canada and one elsewhere) or according to the position developed in the GIR (i.e. three separate OMSs and three separate CAD systems, two of each which have been successfully fielded in Canada and one elsewhere). Xwave indicated that care must be taken in the Department's suggestion that there are other products which could have been proposed by Xwave.

Xwave submitted that it understood that the contract, if accepted, would allow the successful bidder to integrate the OMS and the CAD system before delivery. However, Xwave submitted that, as section 3.3.1.1 of the SOW refers to "software" in the singular, it necessarily follows that each bidder's proposal had to include evidence of a single software system having been successfully fielded in three other police agencies, at least two of which were in Canada. According to that interpretation, the single software system would have to have been previously integrated in order to comply with the prior fielding requirements set out in section 3.3.1.1.

Xwave submitted that it did not believe that the expression "OMS/CAD", as set out in section 3.3.1.1 of the SOW, was ambiguous. It always believed that it meant "OMS or CAD". Xwave argued that any other interpretation would have rendered the first-time integration provisions of the SOW irrelevant.

Xwave submitted that the CAD system is not merely a subsystem of the OMS software. Factually, the specification portions attributable to the CAD system amount to approximately 50 percent of the specifications in the RFP and, in terms of cost, the CAD system represents some 60 percent of the total cost of the contract. Moreover, the diagram shown in Appendix 7 to the SOW clearly demonstrates that the CAD system is integral to SAMPIS. Xwave argued that, in fact, the CAD system is to be installed at all 22 SAMPIS locations and that, without the CAD system, the OMS software is merely a databank resident in a police services area. With respect to the OMS and CAD software which it proposed, Xwave submitted that both were COTS products.

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 applicable trade agreements.

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 AGP provides likewise. Article 506(6) of the AIT provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504.^{7]} The 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 RFP clearly indicates that only proposals meeting all the mandatory requirements are to be considered for award. It also clearly indicates that the requirements of section 3.3.1.1 of the SOW are mandatory under the RFP. This is not in dispute.

In the Tribunal’s opinion, the question at issue rests fundamentally on what constitutes the proper interpretation of the expression “OMS/CAD” found in section 3.3.1.1 of the SOW. Xwave is of the view that, when read in context, it is reasonable to interpret the expression as meaning “OMS or CAD” or “OMS and/or CAD” and that, therefore, it complied with the requirement of the section when it gave evidence that the CAD system that it proposed had been fielded successfully in three police agencies. The Department maintains that the proper interpretation is “OMS and CAD” and that, given that Xwave did not provide evidence that the OMS which it proposed had been fielded successfully in three police agencies, its proposal was rightly declared non-compliant.

The expression “OMS/CAD” found in section 3.3.1.1 of the SOW, read in isolation, could be ascribed any of the three meanings advanced by Xwave and the Department. Indeed, the oblique generally is used to signify “or”, “and” or both. The Tribunal acknowledges that the courts, faced with the issue of interpreting the oblique in a specific situation, have decided that its meaning depends upon the circumstances in which it is used in each case. In *Zellers v. Group Resources*,⁸ the Ontario Court held that “the oblique stroke is, in and of itself, without meaning and totally dependent upon the circumstances in which it is used for its interpretation”.⁹ The Tribunal adopted this position in File No. PR-99-006¹⁰ and adopts it here.

The Tribunal finds that the expression “OMS/CAD” found in section 3.3.1.1 of the SOW, read in the context of the RFP as a whole, means “OMS and CAD”. In the Tribunal’s opinion, in the circumstances, this expression cannot reasonably be interpreted to mean “OMS or CAD”.

The expression “OMS/CAD” was used many times in the SOW outside section 3.3.1.1. The Department submitted that, in all those instances, it meant “OMS and CAD”. Xwave did not contest that. The Tribunal, having reviewed the instances where “OMS/CAD” was used in the SOW, agrees with the Department that, in all these instances, it meant “OMS and CAD”. This establishes a strong likelihood that this expression, when used in section 3.3.1.1, also meant “OMS and CAD”. Incidentally, the Tribunal notes that Xwave itself, in its proposal, used this interpretation.

The Department submitted that, while the expression “OMS/CAD” meant “OMS and CAD”, it did not refer to a single system that integrated OMS and CAD software and, therefore, the requested examples did not have to concern such an integrated system. According to the Department, three separate examples of

7. Article concerning non-discrimination.

8. (1995), 21 O.R. (3d) 522, [1995] O.J. No. 5 (Ont. Ct. (Gen. Div.)).

9. *Ibid.* (QUICKLAW) at 11.

10. *Quality Services International* (28 June 1999) (CITT).

fielding for the OMS and the CAD system would have been sufficient. In most of the other instances, where the expression “OMS/CAD” is used in the SOW, it seems to refer to an integrated OMS/CAD system. One could, therefore, presume that this would also be the case when it is used in section 3.3.1.1 of the SOW. However, this presumption is defeated by sections 3.1, 3.1.1 and 3.3.1.2, which clearly indicate that, for the purpose of the fielding experience requirement, the Department was prepared to consider OMS and CAD software that had not been previously integrated. In particular, section 3.3.1.2 indicated that bidders proposing a system configuration based on first-time integration had to provide experiential evidence of the bidder’s system design and integration capability. Sections 3.1 and 3.1.1, for their part, only required that the CAD system be integrated with the OMS “when delivered” or “ultimately”. The fact that the documents produced by the Department at Xwave’s debriefing of June 20, 2000, in regard to its proposal, mentioned that certain examples of OMS fieldings cited by Xwave in its proposal did not have an integrated CAD system, is not determinative of the interpretation to be given to “OMS/CAD”, especially in view of section 3.3.1.2. Therefore, it is the Tribunal’s opinion that the expression “OMS/CAD” in section 3.3.1.1 did not mean that fielding examples of an integrated OMS/CAD system were required. Three fielding examples for the OMS and three more for the CAD system would have satisfied the requirement of that section.

Xwave argued that, because section 3.3.1.1 of the SOW refers to software in the singular, it had to be interpreted as meaning “OMS or CAD” or a system that integrated OMS and CAD software. Xwave argued that, otherwise, the plural form should have been used. The Tribunal first notes that the word “software” does not take an “s” in the plural form. It is true, however, that the verb which is used in relation to the expression “OMS/CAD” should have been in the plural form, given that, in this instance, the OMS and the CAD system were to be considered separately. Therefore, the word “have” should have been used instead of the word “has”. This fact does not convince the Tribunal of the validity of Xwave’s position. In this context, the Tribunal notes that accepting Xwave’s interpretation would lead to an unreasonable outcome, i.e. that the OMS software or CAD software, both of which, in the Tribunal’s opinion, are important in relation to the procurement, could be judged acceptable as part of a proposed integrated system under the terms of the RFP without the successful fielding of either one being documented in the proposal or having been documented to the extent required in the RFP (i.e. three other police agencies, at least two of which in Canada). The Tribunal also notes, in this respect, that the requirement was for COTS products.¹¹ As indicated earlier, the provisions in solicitation documents must be read in context and be given meaning on that basis. Given the preceding analysis, it is the Tribunal’s view that the expression “OMS/CAD” found in section 3.3.1.1 refers to distinct OMS and CAD software, not necessarily an integrated system.

Xwave alleged that, under such an interpretation, only the Versaterm product could satisfy the fielding requirement of section 3.3.1.1 of the SOW. The Department challenged that assertion. In the present case, the Tribunal does not have to make a determination with respect to that issue. Having determined that the expression “OMS/CAD” in section 3.3.1.1 of the SOW, when read in context, could not reasonably be interpreted to mean “OMS or CAD”, it follows that Xwave reasonably should have become aware of this ground of complaint at the time of the issuance of the RFP. The 10-working-day time limit having long since lapsed, it is now too late for Xwave to complain that section 3.3.1.1 favoured a specific supplier in contravention of the applicable provisions of the trade agreements.¹²

11. See, for example, sections 3.1, 3.2.1.1, 3.3.1.2, 3.3.4.1, 3.3.5.1 of the SOW.

12. Subsection 6(1) of the Regulations provides, in part, that a potential supplier that files a complaint with the Tribunal shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

The Department has requested its costs in the matter. The Tribunal determines that the circumstances of this case do not warrant costs against Xwave. While Xwave's complaint is not valid, it was not without merit.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 NAFTA, the AGP and the AIT and that, therefore, the complaint is not valid.

Peter F. Thalheimer _____

Peter F. Thalheimer
Presiding Member

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