



Ottawa, Monday, May 7, 2001

File No.: PR-2000-064

IN THE MATTER OF a complaint filed by Wescam 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Royal Canadian Mounted Police, subject to the availability of funding, reissue the solicitation, as proposed in the Government Institution Report.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Wescam Inc. the reasonable costs that it incurred in filing and proceeding with the complaint.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: May 7, 2001

Tribunal Member: Patricia M. Close, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Wescam Inc.

Counsel for the Complainant: Gregory O. Somers
Paul D. Conlin

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke
Christianne M. Laizner
Ian McLeod



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IN THE MATTER OF a complaint filed by Wescam 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

COMPLAINT

On February 12, 2001, Wescam Inc. (Wescam) 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 Solicitation No. M9010-011575/A by the Department of Public Works and Government Services (the Department) for the supply of a dual sensor infrared system (DSIS) for operation on Royal Canadian Mounted Police (RCMP) aircraft based in British Columbia.

Wescam alleged that the mandatory requirements relating to gimbal² dimension and weight are biased in favour of the DSIS manufactured by FLIR Systems Ltd. (FLIR). This, Wescam submitted, is contrary to Articles 501 and 504(b) and (g) of the *Agreement on Internal Trade*.³

As a remedy, Wescam requested that the Tribunal, pursuant to subsection 30.13(3) of the CITT Act, postpone the award of any contract or, if a contract has already been awarded, terminate the contract. Furthermore, Wescam requested that the mandatory requirements in paragraph 1.1, item 2 of the Request for Proposal (RFP), be modified to encompass the Wescam 12DS-200 and that a fair and open competition be held on that basis. Wescam also requested that the Department and the RCMP implement methods to ensure that Wescam is treated fairly in any subsequent tender. Wescam requested reasonable compensation to cover its costs in pursuing the complaint.

On February 16, 2001, 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 That same day, the Tribunal issued an order postponing the award of any contract in connection with the solicitation at issue until the Tribunal determined the validity of the complaint. On March 16, 2001, the Department filed an abbreviated Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On March 28, 2001, Wescam filed comments on the GIR with the Tribunal.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. The GIR defines “gimbal” as follows: “the camera, casing and support structure (the ‘eyeball’) of the infrared equipment which is positioned outside the aircraft.”
 3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
 4. S.O.R./93-602 [hereinafter Regulations].
 5. 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 January 22, 2001, a Notice of Proposed Procurement (NPP) and RFP were posted on Canada's Electronic Tendering Service (MERX). The NPP reads, in part, as follows: "The RCMP has a requirement to purchase one only Dual Sensor Infrared system having a gimbal dimension of no more than 12" for operation on Force helicopters based in British Columbia."

Article 10(1)(b) of section 1A of the RFP indicates that the bids received will be evaluated for compliance with the mandatory requirements listed in Appendix "A" to the RFP. Article 11 provides that, to be considered responsive, a bid must meet all the mandatory requirements of the solicitation.

Item 2 of paragraph 1.1 under the heading "Mandatory Requirements", Appendix "A" to the RFP, reads as follows: "Gimbal must be under 12 inches in diameter and must weight less than 35 lbs. to minimize drag and reduce ballast requirements."

On January 22, 2001, Wescam wrote the RCMP to object, *inter alia*, to certain technical specifications relating to the gimbal dimension and weight limits. On January 29, 2001, the Department responded to Wescam's objection advising that the gimbal dimensions and weight limitations specified in the RFP would not be modified because: "[d]ue to the Weight and Balance considerations, dynamic loading and the effect of drag on a small single engine aircraft, the RCMP cannot go beyond the gimbal dimensions or the weight limitations that have been specified in Para 1.1, Item 2."

Wescam filed its complaint with the Tribunal on February 12, 2001.

On March 5, 2001, the Department advised Wescam in writing that funding for the DSIS would not be available in the 2000-2001 fiscal year and that, should funding become available in the new fiscal year, the requirement would be posted again and rebid.

POSITION OF PARTIES

Department's Position

With respect to Wescam's allegation that the technical specifications relating to the gimbal dimension and weight limitations are biased against Wescam's product and unjustifiably limit competition, the Department submitted that it did not intend to limit competition in the solicitation at issue. Rather, the Department submitted, it was its intention and that of the RCMP to set out the proper specifications in the context of their goal to procure a DSIS that was capable of being used in multiple applications, including immediate use on Bell 206 and Eurocopter AS350B3 helicopters and future use on fixed wing aircraft (Cessna 182, 206 and 210). In this context, the Department submitted that the RFP mentioned only the immediate requirement for use on helicopter aircraft and was silent on the future use of the DSIS on fixed wing aircraft. The Department argued that the gimbal dimension and weight restrictions are attributable to the goal of achieving multiple mission capability. The Department submitted that the 12-inch dimension and 35-pound weight restrictions are specifically related to airworthiness certification for fixed wing operation.

The Department submitted that, subject to the availability of funding from British Columbia, the Department and the RCMP now plan to reissue the solicitation during the new fiscal year for the procurement of a DSIS for helicopter use only. The Department added that the new solicitation will contain

modifications to increase the gimbal dimension and weight limitations, which modifications will address Wescam's concerns.

Referring to previous determinations of the Tribunal,⁶ the Department submitted that, where a problem with the interpretation of a technical requirement on the evaluation criteria only becomes apparent after bid closing, the correct approach is to cancel and re-tender the requirement.

The Department submitted that, under the circumstances, Wescam's only entitlement to relief may relate to complaint costs.

Wescam's Position

On March 28, 2001, Wescam requested that the case be decided on the basis of the existing record.

TRIBUNAL'S DECISION

Subsection 30.14(1) 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 AIT.

Article 506(6) of the AIT provides that tender documents shall clearly identify the requirements of the procurement. In this instance, the Department submitted that the procurement intended by the RCMP was that of a DSIS for multiple mission capability, i.e. on helicopters and fixed wing aircraft. However, the Department argued that, due to an omission found only after bid closing, the requirement for multiple mission capability was not set out in the RFP. The Tribunal accepts the Department's explanation and, on this basis, finds that the RCMP and the Department have failed to apply the provisions of Article 506(6) of the AIT in that they failed to identify clearly all the requirements for the DSIS in the RFP.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that, subject to the availability of funding, the RCMP reissue the solicitation, as it proposed in the GIR.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Wescam the reasonable costs that it incurred in filing and proceeding with the complaint.

Patricia M. Close

Patricia M. Close
Presiding Member

6. *Installation Globale Normand Morin & Fils* (21 August 1998), PR-98-002 (CITT); and *Service Star Building Cleaning* (12 February 1999), PR-98-031 (CITT).