



Ottawa, Thursday, July 25, 2002

File No. PR-2001-077

IN THE MATTER OF a complaint filed by FLIR Systems Ltd.  
under subsection 30.11(1) of the *Canadian International Trade  
Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO 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 not valid.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Ellen Fry  
Ellen Fry  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

The statement of reasons will follow at a later date.

Date of Determination: July 25, 2002  
Date of Reasons: August 15, 2002

Tribunal Members: Patricia M. Close, Presiding Member  
Zdenek Kvarda, Member  
Ellen Fry, Member

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Michèle Hurteau

Complainant: FLIR Systems Ltd.

Counsel for the Complainant: Gerry Stobo  
Vincent DeRose

Intervener: Wescam Inc.

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

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



Ottawa, Thursday, August 15, 2002

File No. PR-2001-077

IN THE MATTER OF a complaint filed by FLIR Systems Ltd.  
under subsection 30.11(1) of the *Canadian International Trade  
Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO 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 March 27, 2002, FLIR Systems Ltd. (FLIR) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerns the procurement (Solicitation No. W8475-02BE01/B) by the Department of Public Works and Government Services (PWGSC) for the supply and installation of a commercially available off-the-shelf multi-spectral electro-optics/infrared (EO/IR) suite<sup>2</sup> (hereinafter sensor suite) for use on Department of National Defence (DND) CP 140 Aurora aircraft.<sup>3</sup>

FLIR's first ground of complaint was that, contrary to the requirements of the *Agreement on Internal Trade*,<sup>4</sup> the *North American Free Trade Agreement*<sup>5</sup> and the *Agreement on Government*

- 
1. R.S.C. 1985 (4th Supp.), c. 47.
  2. EO/IR sensing equipment is used on aircraft to provide daylight video and thermal imaging to the aircrew. This allows the aircrew to receive pictures, or images, during night and daytime operations when conducting, for example, search and rescue operations, maritime patrol, reconnaissance and coastal surveillance. Much like a digital video camera, the imaging system captures images through an array of charged coupled devices (CCDs). Each CCD produces signals that correspond to the wavelengths of light that it captures. These wavelengths are either emitted or reflected by the object of interest. Typically, EO/IR type sensors are CCDs that are sensitive to IR and near IR wavelengths. IR and near IR wavelengths can be detected by EO/IR sensors at great distances, and regardless of conventional visibility impairments. Additionally, all objects that emit heat, such as human bodies, radiate at IR wavelengths. This allows all such objects to be imaged by OE/IR sensing systems, despite their inability to be distinguished using visible wavelength imaging. Source: Complaint at 6-8.
  3. The Canadian Forces operate a fleet of 18 CP 140 Aurora aircraft. These aircraft are multi-mission surveillance and patrol aircraft that provide Canada's strategic airborne surface and sub-surface surveillance capability. Replacement of the sensor suites on the Aurora aircraft was originally scheduled to occur around 2005. However, according to the Government Institution Report, subsequent to the events in the United States on September 11, 2001, the schedule was advanced because of the resulting increased role of the Aurora, the extremely poor serviceability rates of the existing sensor suites and because an EO/IR system can be run in a stand-alone configuration before modernization of the Aurora's computer systems. Therefore, the specifications were amended to provide for procurement of a modern sensor suite on an urgent basis.
  4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
  5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

*Procurement*,<sup>6</sup> the specifications provided in the Request for Proposal (RFP), as they relate to the sensor suite, are written in terms of design and descriptive characteristics resembling the specifications of Wescam Inc.'s (Wescam) Model 20 and not in terms of performance output. FLIR's second ground of complaint was that it had not been provided equal access to this procurement opportunity and was unfairly discriminated against and precluded from bidding a sensor suite that can equally perform the required functions, using different technology. FLIR also alleged that it had been denied crucial information with respect to the range parameters necessary to submit a responsive bid.

FLIR requested that the Tribunal issue an order postponing the award of any contract in relation to this solicitation. In its March 27, 2002, submission, FLIR requested an opportunity to make submissions pursuant to subsection 30.13(4) of the CITT Act on the certification of the procurement being urgent or that a delay in awarding the contract would be contrary to the public interest. In the alternative, FLIR requested that PWGSC or DND provide an explanation as to why the procurement is urgent or why a delay would be contrary to the public interest. As a remedy, FLIR requested that the solicitation be cancelled and a new solicitation be issued in accordance with the provisions of the relevant trade agreements. In the alternative, FLIR requested compensation by an amount specified by the Tribunal for lost profits or lost opportunity. FLIR also requested its bid preparation costs and its reasonable costs incurred in relation to preparing and proceeding with the complaint. FLIR also requested that the Tribunal order PWGSC and DND to produce complete documentation relating to how the performance and technical specifications for the sensor suite's staring array were developed and the rationale for those specifications.

On April 5, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry with respect to its first ground of complaint, as it had 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*.<sup>7</sup> In addition, the Tribunal informed the parties that it would not order PWGSC to produce the documents requested, but instead requested that those documents pertinent to the rationale regarding the specifications developed for the sensor suite's staring array be submitted along with the Government Institution Report (GIR). That same day, the Tribunal issued an order postponing the award of any contract in connection with this solicitation until the Tribunal determined the validity of the complaint. On April 15, 2002, the Tribunal informed the parties that Wescam had been granted intervener status in the matter.

On April 16, 2002, PWGSC certified, in writing, to the Tribunal that the procurement of goods and services to which the complaint pertains was urgent and that a delay in awarding the contract would be contrary to the public interest. Accordingly, on April 23, 2002, the Tribunal issued an order rescinding its postponement of award order.

The Tribunal received additional information from FLIR on its second ground of complaint on April 10, 2002. The Tribunal informed the parties that, since FLIR's second ground of complaint was timely, it was accepted for inquiry.

---

6. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].

7. S.O.R./93-602 [hereinafter Regulations].

On May 10, 2002, PWGSC filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>8</sup> On June 14, 2002, FLIR and Wescam filed comments in response with the Tribunal.

There was a request for an oral hearing, but, in this case, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the information on the record.

## **PROCUREMENT PROCESS**

### **Background<sup>9</sup>**

The preparation of the performance specifications for the sensor suite was managed by an electro-optical/infrared systems engineer on contract with DND. Based on available technical information from ongoing discussions with DND operational personnel and electro-optical specialists, from technical materials and reference books consulted, and briefings received from FLIR, Wescam and Elbit Systems Ltd., the engineer drafted specifications, giving the sensor suite the technical capacity to meet DND's operational requirements. Specifically, the minimum size of the staring array of 640 x 480 pixels was chosen to reduce complexity and increase performance.

On September 9, 2001, a Letter of Interest (LOI) was issued on MERX,<sup>10</sup> giving potential suppliers advance notice of DND's requirement for the sensor suite. The draft specifications were issued with the LOI, and potential suppliers were invited to provide comments. A number of potential suppliers, including FLIR's parent company, FLIR Systems, Inc., provided comments. For example, FLIR Systems, Inc. proposed a change to section 3.4.1 of the draft specifications that required that "[t]he staring array ... consist of not less than 640 x 480 pixel elements", proposing instead that it include a lesser minimal number of pixels.

### **Procurement**

On February 22, 2002, a Notice of Proposed Procurement for the RFP was published on MERX. The RFP was also published on February 22, 2002, with a closing date of April 2, 2002.

The RFP includes the following provisions relevant to this case.

Section 3.4.1 of Annex C to the RFP reads, in part:

[37M<sup>[11]</sup>]The staring array shall consist of not less than 640x480 pixel elements.

Section 3.4.2 of Annex C to the RFP reads, in part:

[45M] The EO sensor(s) shall be (an) electro-optic imaging sensor(s) and shall:

consist of staring array with a minimum of 640x480 pixel elements in the array.

---

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

9. Based on submissions by PWGSC.

10. Canada's Electronic Tendering Service.

11. Denotes a mandatory requirement.

Paragraph 1 of Annex A to Annex C to the RFP reads, in part:

EO/IR system performance is to be tabulated in Table 2.<sup>[12]</sup> The operational community characterizes EO/IR system performance by the range at which specific objects are detected, recognized and identified. The conversion of these qualitative criteria to permit quantitative evaluation of system performance will be in terms of cycles or line pairs and will be performed by the contractor incorporating Johnson's criteria for bar target equivalency. Ranges are to be calculated for specific COI [contact of interest] under the specified constraints.

By e-mail correspondence, dated February 26, 2002, FLIR Systems, Inc. requested clarification of the RFP as follows:

Annex C paragraph 3.4.1 [37M] The mandatory requirement states a staring array shall consist of not less than 640x480 pixel elements. The array used in our COTS product produces 640x480 pixel elements having equal performance in terms of pixel elements in the image, but is physically smaller than 640x480. Is the requirement for the physical array size, i.e. the implementation that is specified, or is it for the required pixels produced, i.e. the resulting performance that is specified?

On February 27, 2002, PWGSC responded by e-mail correspondence to FLIR Systems, Inc.'s request for clarification, restating that the number of pixels specified the minimum physical size of the array.

On March 7, 2002, FLIR objected to sections 3.4.1 and 3.4.2 of the specifications as follows:

Paragraphs 3.4.1 and 3.4.2 of Annex C fail to define the IR sensor and EO sensor staring array in terms of performance requirements. Instead, these paragraphs explicitly demand particular dimensions and characteristics, e.g. the sensors' staring array "shall consist of not less than 640x480 pixel elements." This latter requirement is clearly design-oriented and excludes FLIR's Star SAFIRE II, which has a 320x240 array and utilizes established micro scanning techniques to produce 640x480 pixels that provide comparable performance to that of a physical 640x480 array. If the RFP were properly drafted in terms of performance requirements, FLIR's product would fulfill the DND's performance requirement and make this procurement a truly competitive process.

On March 13, 2002, PWGSC formally responded to FLIR's objection, advising as follows:

The Crown does not agree that this is a design-oriented specification as published in the RFP for the EO/IR procurement. The specification merely establishes a lower limit that was derived from an operational requirement of a modern 'state-of-the-art' system. Subsequent research into fielded systems by subject matter experts indicate that a 'modern system' would feature no less than a 640x480 pixel array size. In fact, modern EO/IR cameras typically have at least 640x480 pixel [staring] arrays and the most recent have considerably more with examples ranging from 640x512 to 1280x1024 pixels. The lower limit restriction is seen as both viable and reasonable for an off-the-shelf acquisition where a number of fielded systems are known to be available from different vendors.

On March 19, 2002, FLIR Systems, Inc. sent an e-mail message to PWGSC as follows:

1. Can a bid offering a 320 x 240 array micro scanned to give similar performance to a 640x480 array be offered for the interim solution (first 6 systems)?
2. If the answer to the first question is "yes", can we get an extension of the RFP response by at least 3 weeks (preferable 4)?

---

12. Table 2, "Expected Performance" contains various information, including a column titled "Range NM [nautical mile] (N50)". However, no range information is included in the table.

3. May we have the Range parameter requirements for the expected performance on the targets outlined in the RFP on page 43 Annex C? This range data is considered absolutely essential.

On March 25, 2002, PWGSC communicated to all potential suppliers “Questions and Answers Set No. 3”. Answer 17 reads, in part:

There is an urgent need, on the part of the Canadian Forces for a non-integrated EO/IR System, which has resulted in a compressed schedule for the acquisition of an EO/IR System. The Crown expects bids to be fully compliant to the RFP. In the interests of expediency, the Crown would accept a retrofit of up to the first six systems delivered provided that the bidder provides a full description of the development program required to bring the partially compliant initially delivered systems to a fully compliant state. The bidder must provide concrete evidence on how he intends to meet the requirements of the RFP. It is the responsibility of the bidder to convince DND that the retrofit systems and subsequent delivered systems will be fully compliant. The interim systems may not be fully compliant to the RFP but must be modified to a fully compliant state. The seventh system and all follow-on system would be delivered fully compliant.

Answer 21, which addresses the range parameter requirements, reads:

This information must be provided by the bidder in accordance with paragraph 1 of page 42 of Annex C.

## **POSITION OF PARTIES**

### **PWGSC’s Position**

PWGSC submitted that sensor suites are classified under FSC 58 for “Communication, Detection and Coherent Radiation Equipment”, which were excluded goods pursuant to Article 1001(1)(b) and Article 2 of Section A to Annex 1001.1b-1 under NAFTA. Moreover, the general notes of NAFTA Annex 1001.2b provide that “[t]his Chapter does not apply to procurements in respect of: . . . (c) contracts respecting FSC 58”. Similarly, goods of FSC 58 are excluded from the WTO–AGP pursuant to Article VI and general note 1(c) to the Canadian Appendix 1. Therefore, it concluded, only the AIT is applicable. PWGSC further argued that there is no specific reference in the AIT requiring technical specifications to be defined in terms of performance “where appropriate”, like Article 1007 of NAFTA and Article VI of the AGP. PWGSC submitted that there is no prohibition on defining technical specifications by design or description. It argued that this holds true even under the AGP and NAFTA, which only require the use of performance criteria rather than design or descriptive characteristics “where appropriate”. Specifications defined by design description are not inherently discriminatory. PWGSC submitted that since NAFTA and the AGP permit the use of specifications based on a design’s descriptive characteristics, such specifications are not necessarily in breach of the prohibition against discrimination contained in Article 1008(1) of NAFTA and AGP Article VII(1) of the AGP.

PWGSC submitted that, with respect to the federal government, Article 504(2) of the AIT is limited to prohibiting discrimination based on a province or region of Canada and that it is necessary to ignore the clear language of the above-mentioned provision to interpret it as prohibiting other forms of discrimination. PWGSC submitted that the Article 504(3) provides that all measures expressly included in that article, and any other measure that may be included by analogy, are inconsistent with Article 504(2) only if they result in discrimination based on province or region. PWGSC indicated that this interpretation is supported by the decision of the Federal Court of Appeal in *E.H. Industries v. Canada (Minister of*

*Public Works*).<sup>13</sup> PWGSC submitted that the RFP did not discriminate between goods, services or their suppliers based on province or region, and that FLIR did not allege such discrimination.

In the alternative, PWGSC submitted that a breach of Article 504(3)(b) of the AIT occurs only if the RFP includes biased technical specifications in favour of or against particular goods or services or their suppliers and such specifications are used for the purpose of avoiding the obligations of Chapter Five of the AIT. In this context, PWGSC submitted that the RFP does not adopt the specifications of any particular sensor suite.

In the further alternative, PWGSC submitted that FLIR has not alleged or produced any evidence that the RFP employed technical specifications “for the purpose of avoiding the obligations of [Chapter Five of the AIT]”. PWGSC submitted that the Crown did not intend to avoid the obligations of the AIT, in that the RFP provided sufficient notice of the requirements, employed performance-based technical specifications and defined the minimum requirements of a modern sensor suite necessary to meet the Aurora’s operational requirements. Moreover, PWGSC submitted that Article 501 expresses the policy and objects of Chapter Five and that it does not create rights and obligations independent of Article 504(3)(b).

PWGSC submitted that, as indicated by the Tribunal in File Nos. PR-99-040<sup>14</sup> and PR-2000-073,<sup>15</sup> the provisions of the various trade agreements cannot be imported into one another, unless there is a specific reference to that effect. PWGSC submitted that expressing a minimum number of pixels in the staring array is, in fact, a performance measurement. PWGSC further submitted that, relying on the Canadian Navy shipboard electro-optical surveillance systems (SEOSS) procurement, FLIR argues that performance must be defined as the ability of the sensor suite to detect an object of certain dimensions from a certain range and goes so far as stating that “[t]he physical size of the staring array is functionally irrelevant to the performance outcomes required.”<sup>16</sup> Yet, PWGSC submitted, the technical literature on electro-optical imaging contradicts FLIR’s assertions, indicating, for example, that judgments based on range predictions are unlikely to have much merit.<sup>17</sup> PWGSC argued that, as the predicted range of a system is inherently unreliable as a performance indicator, the RFP does not evaluate the proposed sensor suites using range predictions and that such information is required of bidders in Annex C to the RFP for information purposes only. Furthermore, PWGSC submitted that the ranges provided by bidders cannot be independently verified without extensive and time-consuming tests and evaluations, which DND cannot complete, given the urgent nature of the procurement.

PWGSC submitted that the utility of a sensor, defined by its ability to detect, recognize and identify a target, is primarily determined by the sensor’s sensitivity, resolution and field of view. Sensitivity relates to the strength of a target’s signature relative to that of its background. Resolution and field of view relate to the size of a target and search field within which a target may be detected. Thus, PWGSC submitted, the number of pixels in the detector and its angular subtense<sup>18</sup> are critical factors that affect target detection under the operational conditions of the Aurora aircraft.

PWGSC submitted that technical literature supports its position that defining the sensor suite by range predictions is inherently unreliable and that the utility of a sensor suite is defined, in part, by the

---

13. (7 March 2000), A-696-00 (C.A.) at para. 17.

14. *Re Complaint Filed by Brent Moore & Associates*, Order (25 February 2000) (CITT) [hereinafter *Brent Moore*].

15. *Re Complaint Filed by P&L Communications* (24 July 2001) (CITT).

16. Complaint at 12.

17. GIR at para. 41.

18. *Ibid.* 46.



number of pixels in the staring array. PWGSC noted that the U.S. Navy also defines the characteristics of an “advanced infra-red system” for the P-3C aircraft by minimum array size.<sup>19</sup> PWGSC added that, in contrast to the SEOSS procurement, the evaluation criteria of the RFP do not include consideration of the “expected performance” parameters included in Table 2 to the specifications. Thus, proposals will not be evaluated using the estimated ranges specified by bidders.

PWGSC submitted that the mandatory technical specifications cited by FLIR, i.e. 37, 40, 41, 42, 44 and 45, are performance based and that a sensor suite, of any design or description, meeting these performance specifications may be compliant with the RFP. PWGSC submitted, as an example, that mandatory requirement 40 requires the IR sensor to have three fields of view (FOV), the narrow FOV being 2 degrees or less, the broad FOV being 12 degrees or more and the mid-range FOV being between the narrow and the broad FOVs.

PWGSC submitted that FLIR, without any reference to the actual specifications of Wescam’s Model 20, asks the Tribunal to believe that because 6 of the 113 mandatory performance specifications of the sensor suite “bear such a striking resemblance to the specifications of Wescam Inc.’s Model 20, it is impossible to believe their similarity is just coincidental”.<sup>20</sup> However, PWGSC submitted, FLIR has failed to establish any “striking resemblance” between the technical specifications of the RFP and Wescam’s Model 20. Moreover, FLIR does not deny that the technical specifications reflect those of any modern sensor suite, including larger staring arrays. PWGSC submitted that there are presently several modern sensor suites with detectors as large as or larger than that specified in the RFP.<sup>21</sup>

PWGSC submitted that the performance specifications were not drafted to favour one sensor suite over another or one vendor over another. Rather, the specifications reflect a modern sensor suite capable of delivering the necessary mission capabilities of the Aurora aircraft. PWGSC argued that, even accepting that the performance specifications reflect, to some extent, the specifications of a particular product, this does not make the specifications objectionable under the AIT. In any event, PWGSC submitted, the Crown is not insisting on a given product on a no-substitute basis. PWGSC submitted that any product that met or exceeded the minimum requirements of the RFP was acceptable.

PWGSC submitted that FLIR’s complaint with respect to an alleged breach of Articles 504 and 506(6) of the AIT is not detailed in any way, thus denying PWGSC an opportunity to properly respond to the complaint.

PWGSC asserted that the RFP does not unfairly exclude FLIR. Citing various decisions of the Tribunal,<sup>22</sup> PWGSC submitted that DND is solely responsible for determining and defining its legitimate operational requirements. PWGSC submitted that, while the Tribunal’s jurisdiction extends to determining whether the procurement breached the AIT, it does not extend to dictating or “second guessing” the Crown’s requirements. PWGSC submitted that DND has a right to procure a sensor suite with a detector

---

19. GIR, Tab 12.

20. Complaint at 13.

21. Raytheon model RayFLIR 27 at 640 x 480; Wescam Model 20 at 640 x 512; Elbit LORDNID at 1280 x 1024; Rockwell Scientific at 640 x 480, 1024 x 1024 and 2048 x 2048; and Duncan Tech Digital at 1390 x 1040 to 1920 x 1080. BAE, Boeing, Cumulus, Rafael, Recon Optical, Northrop Grumman and UOMZ PA also produce modern sensor suites. See GIR at para. 59.

22. *Re Complaint Filed by Corel* (26 October 1998), PR-98-012 and PR-98-014 (CITT); *Re Complaint Filed by Computer Talk Technology* (26 February 2001), PR-2000-037 (CITT); *Re Complaint Filed by Eurodata Support Services* (30 July 2001), PR-2000-078 (CITT); *Re Complaint Filed by Novell Canada* (17 June 1999), PR-98-047 (CITT).

array of not less than 640 x 480 pixels. Optical precision is determined, in part, by the sensor's FOV and resolution. These aspects of the sensor suite are governed, in part, by the number of pixels.

PWGSC submitted that DND has the right to specify the type of sensor suite that it requires, i.e. a non-scanning system versus a scanning system. In this context, PWGSC expressly refuted FLIR's claim that its Star SAFIRE II system provides equal performance to a staring array with a detector size of 640 x 480 pixels

PWGSC submitted that the detector in a scanning system looks sequentially at different points in the scene, reducing the "look time" at any one point. This reduces the time over which signals from individual pixels can be integrated by the system. As the detector time decreases, so typically does the sensitivity of the system. This results in less chance of detecting a "low contrast target" of the type for which the Aurora would typically be searching. A scanning detector images different points at different times, and a composite image is electronically produced. Image blur increases, particularly where the camera and/or target are moving, as is expected with Aurora applications. A scanning system must also comprise a precision scanning mechanism, typically moving mirrors or prisms, which results in increased hardware complexity with the sensor.

PWGSC submitted that FLIR's second ground of complaint is out of time. The RFP was posted on MERX on February 22, 2002, and FLIR and FLIR Systems, Inc. received a copy the same day. PWGSC submitted that neither FLIR nor FLIR Systems, Inc. objected to the absence of the range parameters in the RFP. The question of the range parameter was raised for the first time on March 19, 2002, by FLIR Systems, Inc. On March 25, 2002, PWGSC advised FLIR that bidders, not DND, had to provide the range data. PWGSC submitted that, in the absence of any objection having been made about the lack of the alleged "crucial information", subsection 6(1) of the Regulations applies.

PWGSC submitted that FLIR became aware of the absence of the range parameter information in the RFP on or about February 22, 2002. However, FLIR did not raise the matter with the Tribunal until March 27, 2002, well after the 10 working days prescribed to do so. In the alternative, PWGSC submitted that, if the March 19, 2002, correspondence by FLIR Systems, Inc. can be characterized as an objection by the wholly independent company, the objection was also made outside the deadline imposed by subsection 6(2) of the Regulations.

PWGSC submitted that the RFP required bidders to provide the predicted range at which a specific contact of interest, with defined minimum dimensions and other specific variables, may be detected, recognized and identified. PWGSC submitted that the predicted range was requested for information purposes only. PWGSC submitted that, given that this information will not be used for evaluation purposes or acceptance testing, it is not necessary for proper bidding. Therefore, PWGSC submitted, in accordance with the provisions of Article 506(6) of the AIT, the performance specifications found at Annex C to the RFP clearly and fully identified the requirements of the procurement.

PWGSC requested its costs.

### **Wescam's Position**

Wescam disputed FLIR's submission that the designated contract is covered by NAFTA and the AGP. It argued that only the AIT applied to the procurement at issue and supported PWGSC's position. It also submitted that, because the AIT does not contain reference to technical specification, FLIR has attempted to import into the AIT the prescriptions of Article 1007 of NAFTA. Wescam submitted that

importing these prescriptions or using them to “interpret” the AIT would violate well-established treaty and legislative interpretation rules. It would also entirely circumvent the intention of the parties to the AIT, which clearly and deliberately omitted these provisions.

Wescam submitted that SAFIRE is manufactured in the United States by FLIR Systems, Inc., FLIR’s parent company. Wescam submitted that, to its knowledge, GASTOPS is the exclusive Canadian distributor of the Star SAFIRE II system and that, therefore, FLIR has not established that it is a Canadian supplier entitled to invoke the procurement procedures of the AIT.

Wescam submitted that FLIR’s U.S. parent has attempted, from the outset of this procurement, to convince DND to restate its requirement in order to accommodate its smaller staring array. Wescam submitted that the Tribunal has clearly established, in previous cases, that the Crown need not adjust or diminish its legitimate operational requirements merely in order to accommodate the wishes of a particular supplier. Wescam argued that this principle is all the more compelling when the Crown’s clearly stated operational requirement has been established by independent research, to offer distinct advantages potentially crucial to the anticipated use of the sensor suite.

Wescam submitted that FLIR seeks to have the Tribunal sit on appeal from the decision of individuals within DND, as well as within the scientific and engineering community, which would require the Tribunal to assess substantial literature on the sensor suite and draw conclusions as to the preponderant view of array size effects on measurement and discrimination parameters. Wescam argued that the procurement prescription against the biasing of technical specifications in favour of a particular supplier or product should not be enlisted to compel the Tribunal into an evaluation of the relative merits of systems, beyond a basic examination of whether the government’s stated requirements are reasonably connected to the performance that it wishes to obtain and do not constitute a clear preference for or against a particular supplier.

Wescam submitted that the only requirement that FLIR has put in issue is the size of the staring array. Wescam submitted that, since FLIR was aware of these requirements at the time that the RFP was issued, the alleged “close matches” relating to other features of the RFP, such as the FOV or the detector’s angular subtense, cannot be taken into consideration.

Wescam submitted that, in order to allege, much less establish, bias in its favour, FLIR is required, at a minimum, to produce evidence that only Wescam can produce a system incorporating such an array. Wescam submitted that FLIR has not done so, and cannot, as several imaging system suppliers offer staring arrays of the size specified in the RFP. In fact, Wescam submitted that FLIR, in its own literature, indicates as an option an array configuration such as the one specified in the RFP and that, given the description published by FLIR, the Crown could not be said to favour any particular suppliers in establishing a minimum 640 x 480 array size in the RFP.

Wescam submitted that, in stationary environments, as long as the viewer and the object viewed are not moving, a smaller array coupled with micro-scanning can approximate the resolution performance of a larger array. However, Wescam submitted, such is not the case in a constantly moving aircraft environment or in environments with lower temperatures.<sup>23</sup>

Wescam submitted that the RFP requirement for a scanning array size of 640 x 480 pixels, and the reason for which many manufacturers increased their staring array sizes, is driven by the diverse conditions

---

23. Wescam’s reply to the GIR at paras. 36, 37.

under which the sensor suite must function, possibly in life or death circumstances. Wescam submitted that, in order to optimize performance, the imaging system designer strives to “put the maximum pixels on the target” for any given range. Wescam added that, although larger arrays are more expensive to produce, surveillance authorities in many countries, including Canada, have determined that mission imperatives justify the use of arrays that are larger than that offered by FLIR in this procurement. Accordingly, Wescam requested that the complaint be declared not valid.

### **FLIR’s Position**

FLIR argued that PWGSC framed the technical specifications in terms of a particular company’s product, the effect of which was to preclude fair competition and which was inconsistent with the provisions of the trade agreements. It argued that the objects and values expressed in the AIT, as well as in NAFTA and the AGP, should be read to require that governments draft technical specifications in terms of performance characteristics rather than design or descriptive characteristics. FLIR also argued that, as it was not provided with crucial information regarding the range parameters, it could not submit a responsive bid, as it was unable to know what performance outputs the sensor suites were expected to meet. FLIR also argued that the effect of the trade agreements makes it clear that the government shall provide sufficient information so that bidders can submit meaningful bids. FLIR also stated that, despite the fact that the Star SAFIRE II imaging system is currently in use on about one third of the P-3C Orion aircraft worldwide, it has been excluded from bidding this modern, cost-attractive solution because the technical specifications of the RFP have been written in a way that are biased against it. FLIR submitted that this type of bias is manifested when a procurement process is developed which unfairly excludes consideration of equally capable solutions.

When considering the government’s position, FLIR submitted that DND and PWGSC have the burden of demonstrating that the procurement was conducted in accordance with the applicable trade agreements. In this context, FLIR submitted that the Tribunal is not required to decide whether FLIR’s sensor suite is as effective or better than any other sensor suite, including Wescam’s Model 20. Rather, it must decide whether the RFP contains at least one provision that is biased against other sensor suite manufacturers whose equipment could perform the required task. FLIR further submitted that the Tribunal must also determine whether the government’s decision not to include range parameters affected the ability of potential suppliers to submit responsive tenders and, in particular, precluded the fair and impartial assessment of alternative sensor systems. FLIR finally submitted that the Tribunal will have to decide whether PWGSC’s admission in the GIR<sup>24</sup> that the Crown was not insisting on a given product on a no-substitute basis reveals an ambiguity that prevented potential suppliers from submitting a bid based on technology capable of achieving the same functional result as that needed for the Aurora aircraft.

FLIR submitted that PWGSC’s assertion that the AIT does not require technical specifications to be based on performance is inconsistent with the government’s own contracting policy. FLIR argued that, by having technical specifications that are overly prescriptive and not based on performance, the government dictates what the equipment should look like rather than how it needs to perform. Such an approach leads to the type of bias found in this complaint.

With respect to the application of the technical specifications of Article 1007 of NAFTA to this case, FLIR acknowledged that the trade agreements are separate and distinct documents. However, FLIR submitted that, because both the AIT and NAFTA promote the same goals of fairness in contracting and of

---

24. GIR at para. 61.

non-discrimination, by referring to the provisions of NAFTA, the Tribunal will be guided on how the provisions of the AIT intend technical specifications to be framed in order to be fair and impartial.

FLIR further submitted that the intentional creation of bias by the government is a factor which the Tribunal should consider in determining the appropriate remedy. It also stated that Article 504(3)(b) of the AIT does not require that a complainant demonstrate that the government intentionally biased the technical specifications. Indeed, FLIR submitted, the violation of the AIT arises as a result of the biased technical specification and not because the government acted with malice. In any event, FLIR submitted that the broader provisions of Article 504, in conjunction with Articles 501 and 506, prohibit a government entity, whether intentionally or inadvertently, from utilizing technical specifications that are biased in favour of, or against, a particular supplier.

With respect to the alleged limited scope of Article 504 of the AIT to bias based on province or region, FLIR submitted that this view runs counter to the objects and purposes of Chapter Five of the AIT. FLIR submitted that, in File No. PR-2000-024,<sup>25</sup> the Tribunal clearly indicated that Article 504 prohibits the biasing of technical specifications, for reasons other than geographic or regional considerations. FLIR submitted that the net effect of the Tribunal's pronouncements is that government entities must, in order to be compliant with the AIT, conduct procurement processes fairly and impartially and not in a manner that discriminates against suppliers. According to FLIR, the government discriminated against it by including technical specifications in the RFP that were functionally irrelevant to the performance of the requirements of the sensor system and that were biased against it when it is actually capable of meeting the performance needs of DND.

FLIR submitted that the physical size of the array does not pre-determine the performance capabilities required of a sensor suite. FLIR added that for PWGSC's to dismiss, in the GIR, range prediction parameters as "inherently unreliable" is to claim that procurements, such as the SEOSS procurement, the recent Royal Australian Air Force procurement of a sensor suite for their P-3C aircraft, and the procurement of marine helicopters for the Canadian Armed Forces,<sup>26</sup> all using range prediction parameters as legitimate measurement tools, are ill conceived. Furthermore, FLIR submitted that the government's claim that range predictions are "inherently unreliable" appears to be a characterization of counsel for the government, as it is not found in the excerpt<sup>27</sup> cited in the GIR and is contradicted by literature which is provided by and relied upon in the GIR.<sup>28</sup>

FLIR further submitted that the assertion in the GIR that the range predictions required in Table 2 in the RFP are for information purposes only contradicts the clear wording in Annex C to the RFP, which makes the provision of this information mandatory.

FLIR submitted that it is not correct to relate the number of pixels to resolution. FLIR submitted that resolution is, in part, a function of the focal length and the individual pixel size and not necessarily of the number of pixels within a staring array. With respect to the government's claim that, due to the urgency of the situation, DND would be unable to conduct an independent assessment of the performance capabilities of the sensor suites proposed, FLIR submitted that repeatedly saying that this procurement is urgent does not make it so.

---

25. *Re Complaint Filed by AT&T Canada* (27 November 2000) (CITT).

26. FLIR's reply to the GIR at paras. 49-53 inclusively.

27. GIR, Tab 8.

28. GIR at paras. 56, 57, 58.

With respect to the no-substitute issue that FLIR raised with the Tribunal on May 29, 2002, FLIR submitted that PWGSC's comments at paragraph 61 of the GIR<sup>29</sup> that PWGSC would have accepted a substitute solution demonstrates latent ambiguity in the technical specifications of the RFP. FLIR further stated that this amounts to a breach of Article 506(6) of the AIT because the government has failed to clearly identify the requirements of the procurement. FLIR submitted that the ambiguity of section 3.4.1 of Annex C to the RFP, in combination with the clarification provided by PWGSC on February 27, 2002, and the admission found at paragraph 61 of the GIR, give rise to at least two reasonable interpretations of the RFP: one interpretation allows for the submission of a substitute that has performance equivalency; and the other interpretation does not. The prejudice of such ambiguity is that FLIR was precluded from bidding on the tender. FLIR added that the Tribunal has consistently held<sup>30</sup> that patent or latent ambiguity in the terms of an RFP, which are material to the ability of potential suppliers to understand the technical specifications of the tender, is inconsistent with the terms of the trade agreements, including the AIT. For this reason alone, FLIR submitted, the Tribunal should recommend that the contract be re-tendered and, in doing so, that PWGSC clearly state that it will accept a system with a physical array size of 640 x 480 pixels or its performance equivalent.

With respect to PWGSC's assertion that there are many companies that produce a staring array of 640 x 480 pixels, FLIR submitted that only Wescam, Raytheon and FLIR have sensor systems capable of meeting the P-3C operational requirement.

FLIR submitted that the RFP contains an irrelevant requirement relating to the physical size of the staring array and that, as such, it is flawed to the point that it cannot meet the requirements of the RFP. FLIR acknowledged that the government has no obligation to compromise its legitimate operational requirement to accommodate it. However, it argued that, as stated in File No. PR-2001-048,<sup>31</sup> not all requirements can be qualified as "legitimate operational requirements" and, in this instance, it submitted that PWGSC and DND have not discharged the onus of demonstrating why a staring array with a minimum of 640 x 480 pixels is required to fulfil DND's needs and to achieve the targeted end result.

Although not disputing that optical precision is determined, in part, by the sensors' FOV and resolution, which are governed by the number of pixels in the staring array, FLIR noted that optical precision can also be obtained using other technology, such as micro-scanning used by the Star SAFIRE II system. FLIR submitted that, where different technological designs exist, all of which have equivalent performance capabilities, it is improper for the government to limit the tender by utilizing exclusionary design features. In this context, FLIR submitted that the government's attempt, in the GIR, to discredit the performance of micro-scanning is without foundation and should be dismissed.

With respect to PWGSC's argument that the allegation relating to the missing range parameters is time-barred, FLIR submitted that it is evident from the record that both it and FLIR Systems, Inc. formed part of a seamless unit in their communications with the government, as FLIR attempted to understand and clarify issues arising in this procurement process. Furthermore, FLIR submitted that the RFP recognizes that, in the normal course of reviewing technical specifications and requirements, an information deficit in

---

29. "Even accepting that the Performance Specifications reflect, to some extent, the specifications of any particular product, which PWGSC expressly denies, this does not make the Specifications objectionable under the AIT. The Crown was not insisting on a given product on a no-substitute basis. Rather, any product that meets or exceeds the minimum requirements of the RFP is acceptable."

30. *Re Complaint Filed by Cifelli Systems* (21 June 2001), PR-2000-065 (CITT); *Re Complaint Filed by IBM Canada* (24 April 1998), PR-97-033 (CITT); *Re Complaint Filed by Hewlett-Packard (Canada)* (21 February 2002), PR-2001-030 and PR-2001-040 (CITT).

31. *Re Complaint Filed by Foundry Networks* (12 March 2002) (CITT).

the RFP may be identified by a potential supplier. When the government replies, it may give an answer which satisfies the potential supplier or, as in this case, raise a serious concern. The ground of complaint arises upon receipt of the government's answer and not necessarily from the date of issuance of the RFP. FLIR further submitted that, in this instance, it does not matter that the request for information came from one corporate entity or another because the answer was provided to all potential bidders on March 25, 2002. On this basis, FLIR argued that this ground of complaint is timely.

## TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations 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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements.

### Preliminary Matters

FLIR filed its complaint under the AIT, NAFTA and the AGP. The Tribunal is satisfied that the sensor suite at issue is properly classified under FSC 58, "Communication, Detection and Coherent Radiation Equipment", a category of goods excluded from the Schedule of Canada in Annex 1001.2b of NAFTA and note 1(c) of the General Notes for Canada in Appendix I to the AGP. Therefore, NAFTA and the AGP are not applicable to this complaint. PWGSC and Wescam raised two issues in regard to the coverage of this complaint by the AIT. PWGSC submitted that, with respect to the federal government, Article 504(2) of the AIT is limited to prohibiting discrimination based on a province or region of Canada and that Article 504(3) illustrates the means by which provincial or regional discrimination may occur. In the alternative, it submitted that a breach of Article 504(3)(b) occurs only if the RFP includes biased technical specifications in favour of or against particular goods or services or their suppliers and such specifications are used for the purpose of avoiding the obligations of Chapter Five of the AIT.

In File Nos. PR-2000-024 and PR-2000-060<sup>32</sup>, the Tribunal considered the issue of geographic neutrality and determined that Article 504 of the AIT is not limited to cases where there is discrimination on the basis of provincial or regional geography, given the purpose of Chapter Five and in light of Article 504(3) of the AIT. It is the Tribunal's view that Article 504(2) prohibits discrimination whether or not provincially or regionally neutral.<sup>33</sup> Having carefully reviewed the above determinations and considered the submissions of the parties, the Tribunal adopts the position and the reasons set out in the above-referenced determinations. As to the alternative arguments concerning Article 504(3)(b) of the AIT, the Tribunal finds no bias in the technical specifications. Its reasons are found below.

Wescam submitted that FLIR is not a Canadian supplier and, therefore, not entitled to invoke the procurement procedures of the AIT. The purpose of Chapter Five of the AIT, as set out in Article 501, is to establish a framework that will ensure equal access to procurement for all Canadian suppliers. In this context, Wescam has submitted that, to its knowledge, GASTOPS, an Ottawa-based company, is the exclusive Canadian distributor of FLIR Systems, Inc.'s Star SAFIRE II sensor suite. However, the Tribunal is satisfied that FLIR is entitled to submit a complaint under the provisions of the AIT. Article 518 of the AIT defines "Canadian supplier" as "a supplier that has a place of business in Canada". FLIR has a

---

32. *Re Complaint Filed by Foundry Networks* (23 May 2001) (CITT).

33. *Re Complaint Filed by AT&T Canada* (27 November 2000) (CITT) at 8.

place of business in Canada and, therefore, it is a Canadian supplier within the meaning of the AIT. Furthermore, in the view of the Tribunal, FLIR is also a potential supplier on the designated contract, a requirement of subsection 30.11(1) of the CITT Act for the filing of a complaint with the Tribunal. A potential supplier is defined in section 30.1 of the CITT Act as “a bidder or prospective bidder”. FLIR did bid on the contract and PWGSC treated Flir and Flir Systems, Inc. as one entity during the bidding process. Therefore, it appears to the Tribunal that FLIR would have been able to supply the product. The allegation by Wescam that only GASTOPS distributes the FLIR system in Canada appears unfounded and, furthermore, is not supported by the evidence submitted by Wescam.

PWGSC submitted that FLIR’s allegation relating to the absence of range parameter information in the RFP was filed with the Tribunal outside the prescribed time frame and is, therefore, time-barred from consideration by the Tribunal. The Tribunal notes that the RFP process allowed bidders to raise questions with PWGSC on any aspect of the RFP to seek clarification. FLIR availed itself of this opportunity and, on March 19, 2002, it raised a question about the availability of the range parameter information. On March 25, 2002, PWGSC clarified that the range parameter information had to be provided by the bidders and not the government. Not satisfied with this answer, FLIR complained about the matter to the Tribunal on March 27, 2002. Given the unitary treatment afforded FLIR by PWGSC, the Tribunal finds that FLIR’s complaint on the issue of the range parameter information was filed with the Tribunal within the 10-working-day time frame prescribed in subsection 6(1) of the Regulations.

### Substance of the Complaint

Article 506(6) of the AIT provides, in part, that tender documents shall clearly identify the requirements of the procurement. Article 504(3)(b) prohibits the biasing of technical specifications in favour of, or against, particular goods or services, or the suppliers of such goods or services for the purpose of avoiding the obligations of Chapter Five.

FLIR alleged that PWGSC and DND, in establishing the minimum size of the staring array at 640 x 480 pixels, have breached the requirement of Article 1007 of NAFTA, the Treasury Board’s contracting policy and the AIT.<sup>34</sup> Specifically, FLIR alleged that the specifications in the RFP, as they relate to the sensor suite, particularly the size of the staring array, are written in terms of design and descriptive characteristics resembling the specifications of Wescam’s Model 20 and not in terms of performance outputs.

The Tribunal finds that there is no merit to this allegation. The provisions of NAFTA and of the Treasury Board’s contracting policy cannot be imported into the AIT. These documents are separate and distinct from one another and the AIT. In *Brent Moore*, the Tribunal stated: “While the Tribunal is cognizant of the value of consistency and transparency, it is of the opinion that the three trade agreements at issue are legally separate one from the other. The Department or a party to any of the agreements cannot, on the ground of administrative efficiency or any other ground, impose a component of one agreement on either of the other agreements, unless there is a specific reference to that effect in an agreement.”<sup>35</sup> Furthermore, the Treasury Board’s contracting policy is an internal government policy and does not determine how the legal requirements of the AIT are to be interpreted by the Tribunal. It is not within the Tribunal’s jurisdiction to adjudicate alleged breaches of the contracting policy.

---

34. The Tribunal has found that NAFTA and the AGP do not apply in this case.

35. *Supra* note 13 at 5.



FLIR has made extensive submissions that design-based specifications versus performance-based specifications, by and of themselves, amount to bias. The Tribunal notes that, contrary to NAFTA, the difference between design- and performance-based specifications is not a distinction expressly set out in the AIT. Furthermore, in the Tribunal's view, specifications based on design criteria are not necessarily unfair or discriminatory.

Having carefully examined all the evidence, the Tribunal is not convinced that there is evidence of bias from the description of the minimum size of the staring array towards a particular product or supplier, i.e. Wescam's Model 20. The Tribunal accepts the evidence that there is more than one company that makes sensor suites with a minimum staring array of the size specified in section 3.4.1 of the RFP. This holds true even if one takes into consideration that the sensor suites proposed must also be commercial off-the-shelf and operational on the P-3C Orion aircraft. In the Tribunal's view, this is further supported by the correspondence of FLIR's parent company in its response to the draft specification where the size of 640 x 480 pixels is referred to as "the third generation of sensor suites". In addition, the Tribunal notes that Wescam's Model 20, towards which the procurement was allegedly biased, has a staring array of 640 x 512 pixels, which is not the configuration stated as the minimum requirement in the RFP. Finally, the pixel configuration was only one feature among some 113 mandatory features of the sensor suite.

The Tribunal accepts the evidence that DND and PWGSC conducted a careful review of their requirements and of the various solutions that the industry had to offer. This review was conducted prior to the issuance of the specifications in the RFP and provided an opportunity for input by the industry. As a result, it was concluded that DND's operational requirement for a modern sensor suite on board the Aurora aircraft would best be met through a request for a solution that included a staring array of at least 640 x 480 pixels. It would appear from the evidence that, in stationary environments, sensor suites with a smaller staring array, coupled with microscanning technology, for example, could achieve optical resolution performance comparable to the staring array with 640 x 480 pixels. However, it appears to the Tribunal, from the evidence submitted, that PWGSC and DND were not convinced that such systems could detect targets in the constantly moving environmental conditions of the Aurora aircraft or in all situations that would be required of them in completing their mission requirements. Moreover, PWGSC concluded that functional range criteria would involve extensive and time-consuming tests. The Tribunal accepts the evidence that specifying a staring array with a minimum size of 640 x 480 pixels clearly identified a legitimate operational requirement of the procurement. In the Tribunal's opinion, setting a minimum standard that reflects operational requirements is a prerogative of a procurement entity and does not necessarily establish bias. The evidence does not indicate to the Tribunal that there was a bias in establishing this criterion in this case.

With respect to FLIR's submission that, contrary to Article 506(6) of the AIT, the requirement of the RFP relative to the size of the staring array was ambiguous, particularly in light of the comments made by PWGSC at paragraph 61 of the GIR, the Tribunal is of the view that the criteria in the RFP, relating to the size of the staring array, were clearly stated and that the statement at paragraph 61 of the GIR does not render the requirement ambiguous. Paragraph 61 of the GIR simply refers the reader to the criteria in the RFP. Furthermore, PWGSC's response of February 27, 2002, made it absolutely clear that the number of pixels set out in the RFP specified the minimum physical size of the staring array. Therefore, FLIR's complaint under Article 506(6) of the AIT is also not valid.

With respect to the range parameter information issue, the Tribunal is of the view that this information would have been critical only if the technical specifications had been drafted in terms of ranges. The technical specifications provided an alternate standard, i.e. the minimum size of the staring

array, to assess proposals. In the Tribunal's opinion, range parameter information was not critical or necessary to submit a responsive bid in this instance.

#### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the complaint is not valid.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Ellen Fry  
Ellen Fry  
Member