



Ottawa, Wednesday, January 22, 2003

File No. PR-2002-035

IN THE MATTER OF a complaint filed by CVDS Inc. 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 valid.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards CVDS Inc. its reasonable costs incurred in preparing and proceeding with the complaint.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Michel Granger  
Michel Granger  
Secretary

Date of Determination and Reasons: January 22, 2003

Tribunal Member: Pierre Gosselin, Presiding Member

Senior Investigation Officer: Daniel Chamaillard

Counsel for the Tribunal: Philippe Cellard  
Dominique Laporte

Complainant: CVDS Inc.

Intervener: Cartel Communication Systems Inc.

Government Institution: Department of Public Works and Government Services

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



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## STATEMENT OF REASONS

### COMPLAINT

On October 24, 2002, CVDS Inc. (CVDS) 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. 21120-016613/A) by the Department of Public Works and Government Services (PWGSC) for the supply of digital voice logging equipment (DVLE) on behalf of Correctional Service of Canada (CSC).

CVDS's complaint consisted of 15 separate grounds. On October 30, 2002, the Tribunal rejected 8 grounds of the complaint due to late filing or the failure to disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements. With respect to 6 other grounds, the Tribunal, being satisfied that PWGSC was entitled to reject CVDS's proposal because it did not meet one of the mandatory requirements, determined that it was not necessary to determine whether the other reasons for rejection were valid and decided not to inquire into those grounds.

The Tribunal accepted the complaint for inquiry solely on the ground that the DVLE proposed by Cartel Communication Systems Inc. (Cartel), the successful bidder, did not comply with a particular technical specification under section 7.7 of CSC's *Electronics Engineering Standards* (EES). CVDS submitted that the above solicitation was carried out in breach of the *Agreement on Internal Trade*<sup>2</sup> and the *Agreement on Government Procurement*.<sup>3</sup>

CVDS requested, as a remedy, that the contract awarded to Cartel be terminated and awarded instead to it. In the alternative, CVDS requested that it be compensated by an amount specified by the Tribunal and that it be awarded its reasonable costs in preparing a response to the solicitation.

On November 22, 2002, Cartel requested leave to intervene in the proceedings. On November 26, 2002, the Tribunal granted Cartel leave to intervene. On December 2, 2002, PWGSC filed a Government

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
  2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
  3. 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)>.

Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On December 20, 2002, CVDS filed its comments on the GIR with the Tribunal.

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

The procurement for the DVLE (an Eventide VR240 or equivalent), on behalf of the CSC, was originally advertised on June 5, 2002, through MERX with a closing date of July 18, 2002. The bid closing date was ultimately extended to August 26, 2002.

- Page 4 of the Request for proposal (RFP) lists as attachments to the RFP:

Statement of Technical Requirements, Issue 1, 5 March 2002  
Electronics Engineering Standards, ES/STD-0101, Rev 3, 5 Mar 2002

- Clause 15 of the RFP, entitled “Mandatory Requirements”, reads in part:

The Bidder must comply with the technical requirements and all terms and conditions specified in this RFP document. Bids not meeting all of the mandatory requirements will be considered non responsive.

- Section 4 of the “Statement of Technical Requirements”, Issue 1, 5 March 2002, reads as follows:

### 4.0 TECHNICAL REQUIREMENTS

#### 4.1 General

The proposed DVLE equipment’s technical specifications will be in accordance with the CSC ES/STD-0101 (Revision 3), DVLE Standard.

- Section 7 of the EES, ES/STD-0101, Revision 3, 5 Mar 2002, reads, in part, as follows:

### 7.0 TECHNICAL REQUIREMENTS

The DVLE shall meet the requirement of the following specifications:

7.7 Line Input: >20K ohms, transformer isolated.

The bidding period closed on August 26, 2002. Two proposals, one from CVDS and one from Cartel, were received. CVDS proposed its own equipment, while Cartel proposed the Eventide VR240, manufactured by Eventide Inc. The evaluators determined that CVDS’s proposal was non-compliant and found Cartel’s proposal compliant with the terms of the solicitation. On October 2, 2002, Cartel was awarded the contract. On October 9, 2002, CVDS attended a debriefing with PWGSC and the CSC, where it was informed that its proposal was evaluated as non-responsive.

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

## POSITIONS OF PARTIES

### CVDS's Position

CVDS stated that the requirements of section 7.7 of the EES called for the DVLE that met the technical line input impedance of ">20K ohms", transformer isolated, as specified in the EES; Cartel's proposed DVLE only provided for a line input impedance of 10K ohms.

CVDS submitted that the DVLE supplied by Cartel did not meet the requirement, but was nevertheless accepted. As such, CVDS submitted that PWGSC should have evaluated Cartel's proposal as being non-compliant. This, in CVDS's view, constitutes a breach of Article 506(6) of the AIT.

In its comments on the GIR, CVDS indicated that, although Cartel wrote "comply" in its proposal in connection with section 7.7 of the EES, it is obvious that the proposed DVLE did not comply, as both the proposal and the Eventide documentation stated 10K ohms as line input. CVDS submitted that, even though PWGSC stated that Cartel intended to supply the DVLE in line with the technical specification of the RFP, "intent" was not a criterion of the RFP.

### PWGSC's Position

PWGSC submitted that CVDS's complaint is based on the technical specification of the Eventide VR240 DVLE obtained by CVDS from Eventide's Web site, where the input impedance listed for the Eventide VR240 is 10K ohms. PWGSC submitted that, while Eventide's Web site refers to a standard input impedance of 10K ohms for the Eventide VR240 DVLE, Eventide is able to supply DVLE with a variety of input impedance specifications in accordance with the requirements of its customers.

In this context, PWGSC submitted that a similar allegation was raised in File No. PR-2001-071.<sup>5</sup> One of the allegations in that case, also based on specifications on the Web site, was that the hydraulic lift proposed by the successful bidder did not have the required technical specifications. The Tribunal decided, at that time, that the manufacturer was not limited to the standard published on its Web site and that the actual product proposed complied with the required specifications.

PWGSC further submitted that the evaluators accepted Cartel's proposal as responsive to the mandatory requirements and that Cartel had complied with both the general terms of section 4.1 of the "Statement of Technical Requirements" and the specific provision of section 7.7 of the EES. PWGSC argued that the evaluators did not notice the reference to "10K ohms" in Cartel's response to section 7.7 of the EES and, therefore, did not seek clarification of this apparent ambiguity. However, PWGSC stated that Cartel's subsequent actions, in supplying the DVLE that complied with the ">20K ohms" technical requirement, indicated that the ambiguity was inadvertent and not consequential to the evaluation.

PWGSC submitted that CVDS's allegation is without basis and should be dismissed, and reserved the right to make further submissions on costs.

## TRIBUNAL'S DECISION

Section 30.14 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

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5. *Re Complaint Filed by Équipement Industriel Champion Inc.* (5 June 2002) (CITT) [hereinafter *Équipement Industriel*].

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 applicable trade agreements.

Article 506(6) of the AIT provides, in part, that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

Section 7.7 of the EES is a mandatory technical specification that provides that the DVLE shall have a line input greater than 20 K ohms, transformer isolated. In relation to section 7.7 of the EES, Cartel’s proposal read “Comply: 10k, transformer isolated”.

PWGSC argued that the evaluators did not notice the reference to “10k” ohms in response to section 7.7 of the EES and did not seek clarification of this apparent ambiguity. PWGSC further submitted that Cartel’s subsequent actions, in supplying equipment that complied with the line input requirement, indicated that the ambiguity was inadvertent and not consequential to the evaluation.

This case deals with Cartel’s failure to meet a mandatory requirement. According to the RFP, any such failure renders the bid non-compliant. The reference to “10k” ohms in Cartel’s proposal was, at the very least, ambiguous and it is disturbing to read that PWGSC believes that it could have “clarified” the matter and accepted the bid as if it were compliant. It is the Tribunal’s opinion that this could have constituted a change in a substantive element of the bid. The Tribunal cannot accept PWGSC’s argument to the effect that the supply, later on, of equipment complying with the line input requirements, indicates that Cartel’s error in the proposal was inconsequential to the evaluation. The Tribunal is of the view that the eventual delivery of a product that complied with the line input requirement is totally outside of the scope of the evaluation of the proposals and does not, in any way, have the effect of rendering compliant a proposal that is non-compliant. The Tribunal is of the opinion that the evaluators should have declared Cartel’s proposal non responsive pursuant to clause 15 of the RFP, which provides that bids not meeting all the mandatory requirements will be considered non responsive.

PWGSC submitted that the allegations raised by CVDS are similar to those raised in *Équipement Industriel*. In that case, although one of the allegations, also based on the manufacturer’s specifications on its Web site, was that the hydraulic lift to be supplied by the successful bidder did not meet the required technical specifications of the RFP, the Tribunal found that the actual product proposed by the successful bidder complied with the required specifications. The Tribunal does not agree with PWGSC’s assertion that the allegations raised in *Équipement Industriel* are similar to the case at hand. In the present case, although CVDS initially relied on the specifications on the Web site in support of its complaint, it is clear from Cartel’s bid that the product proposed did not meet the mandatory requirements of the RFP. Therefore, the reasoning in *Équipement Industriel* is not pertinent.

In light of the foregoing, the Tribunal finds that PWGSC, by not disqualifying Cartel’s bid, breached the provisions of Article 506(6) of the AIT and that the complaint is, therefore, valid.

The Tribunal awards CVDS its costs of proceeding before the Tribunal in relation to the complaint, but will not recommend any remedy. In coming to its decision, the Tribunal has taken into account the fact that CVDS’s bid was properly declared non-compliant.

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid. Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards CVDS its reasonable costs incurred in preparing and proceeding with the complaint.

Pierre Gosselin  
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Presiding Member