



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DETERMINATION AND REASONS

File No. PR-2003-073

Canadyne Technologies Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Wednesday, April 14, 2004*

Canada

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS ..... 1

    COMPLAINT ..... 1

    PROCUREMENT PROCESS..... 1

    POSITIONS OF THE PARTIES .....4

        Canadyne’s Position .....4

        PWGSC’s Position .....4

    TRIBUNAL’S DECISION.....5

    DETERMINATION OF THE TRIBUNAL .....7

IN THE MATTER OF a complaint filed by Canadyne Technologies 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*.

**BETWEEN**

**CANADYNE TECHNOLOGIES INC.**

**Complainant**

**AND**

**DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**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 that the Department of Public Works and Government Services re-evaluate all proposals submitted in response to Solicitation No. W010A-04AG12/A in accordance with the requirements set out in the Request for a Standing Offer. In this regard, the re-evaluation of the proposals would be based strictly on the information provided by bidders in their initial proposals. In other words, unless the proposal explicitly indicates that the offer deviates from the specification or proposes equivalent products, the items proposed should be assumed to conform to the specifications of the Request for a Standing Offer.

If the re-evaluation indicates that the standing offer should have been issued to a supplier other than POL-E-MAR Inc., the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the standing offer issued to POL-E-MAR Inc. and award it to the lowest responsive bidder. If Canadyne Technologies Inc. is identified as having submitted the lowest responsive bid, the Canadian International Trade Tribunal recommends that it be compensated for the profit that it would have earned on all call-ups that have already been placed with POL-E-MAR Inc. The compensation for lost profit would be calculated based on the prices being offered by Canadyne Technologies Inc. in its proposal for the items that have been purchased under any call-ups.

If, within 30 days from the completion of a re-evaluation that identifies Canadyne Technologies Inc. as having provided the lowest responsive bid, the parties are unable to reach an agreement for compensation that recognizes that Canadyne Technologies Inc. should have been awarded the standing offer and would have had the opportunity to profit therefrom, Canadyne Technologies Inc. should file a submission with the Canadian International Trade Tribunal in accordance with the *Procurement Compensation Guidelines*.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

Tribunal Member: Zdenek Kvarda, Presiding Member

Investigation Officer: Michael W. Morden

Counsel for the Tribunal: Dominique Laporte

Complainant: Canadyne Technologies Inc.

Government Institution: Department of Public Works and Government Services

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

Please address all communications to:

The Secretary  
Canadian International Trade Tribunal  
Standard Life Centre  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario  
K1A 0G7

Telephone: (613) 993-4717  
Fax: (613) 990-2439  
E-mail: [secretary@citt-tcce.gc.ca](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### COMPLAINT

1. On January 16, 2004, Canadyne Technologies Inc. (Canadyne) 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 concerned the procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) of harbour containment booms and associated equipment.

2. Canadyne alleged that PWGSC improperly rejected its proposal submitted in response to Solicitation No. W010A-04AG12/A. Specifically, Canadyne alleged that PWGSC refused to recognize Canadyne's statements, contained in its bid and its response to PWGSC's request for additional information, claiming that the items that it proposed met the specifications of the Request for a Standing Offer (RFSO).

3. Canadyne requested the postponement of any call-ups against the standing offer issued to the winning bidder, POL-E-MAR Inc. (POL-E-MAR). It also requested, as a remedy, that its bid be re-evaluated and, if found to be responsive, that it be considered on a price basis for the award of the standing offer. Alternatively, Canadyne requested that it be compensated for the profit that it would have earned, had it not been disqualified from the tendering process.

4. On January 21, 2004, the Tribunal issued an order for the postponement of the award of any contract. On February 16, 2004, PWGSC filed the Government Institution Report (GIR) with the Tribunal. Canadyne filed its comments on the GIR on February 26, 2004.

5. 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

6. The RFSO was issued on July 22, 2003, with a closing date of September 30, 2003. The date for the receipt of offers was extended to October 1, 2003.

7. Page 2 of the RFSO, under "REQUIREMENT", reads as follows:

**It is mandatory that items conform to the specifications as indicated.**

8. Six individual items are identified on pages 2 through 4 of the RFSO as follows:

1. Layflat inshore harbour pollution boom 18 inch; made of a PVC type material, freeboard, 6 inch plus or minus 0.500 inch, draft, 12 inch plus or minus 1.000 inch. Weight approximately 1.5 pound per foot, high visible yellow; boom stenciled with the standard 2.000 inch letters gloss black in colour showing "DND 98-1". Boom is to be made in 50 foot sections and is to have a top tension strap, ballast chain and flat foam floatation built in. The ballast chain pocket is to be double lined to prevent wear and to add strength. Boom is to be complete with joiners (complete with grapple hook loop attached to the top end) to make one section. Joiners are to have foam floatation attached to both sides. Boom sections are to have D-tabs attached to tension strap and ballast chain ends to facilitate using the joiners. Joiners are to come complete with 2 spring

---

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

tension toggle pins 2.625 inches long. Toggle pins are to be made of stainless steel. There shall be one pin on the top and one pin on the bottom of each joiner opposite sides, with stainless steel bolts and nylock nuts in the other holes.

Material construction:

Base Fabric Weight. . . . . 163 g/m<sup>2</sup> as minimum  
 High tenacity Weft Inserted  
 Filament Size. . . . . 1000 denier  
 Physical Properties;  
 Grab Tensile. . . . . 1887 x 1776N  
 Trapezoid Tear. . . . . 244 x 244N  
 Cold Crack (method 5874@-67). . . no cracking or flaking  
 Excellent UV and Abrasion Resistance

1 Nov 2003 – Oct 31 2004	Nov 2004 – Oct 2005	Nov 2005 – Oct 2006
\$ _____ per 50 feet	\$ _____ per 50 feet	\$ _____ per 50 feet

(Estimated Usage 2000 feet per 12 month period)

2. Towing Cans;
  - Aluminum construction
  - 11.5 inch diameter, x 14.5 inch can with 10.5 inch skirt
  - Dockside slider attached to one end
  - Boom attached to the other
  - Towing Bridle attached to top

1 Nov 2003 – Oct 31 2004	Nov 2004 – Oct 2005	Nov 2005 – Oct 2006
\$ _____ each	\$ _____ each	\$ _____ each

(Estimated Usage 10 per 12 month period)

3. Containment Boom Reel;
  - Steel tube frame
  - Aluminum spool
  - Free Wheel Capability
  - Quick Disconnect hydraulic lines
  - Pedestal Bearings on spool shaft to frame
  - Weather Tight cover for storage
  - approximate size:
    - frame - overall length 120 inch
    - overall width 82.5 inch
    - with bolt down pads on each leg.
    - reel - overall length 98 inch
    - diameter 78 inch
    - reel hub 20 inch
    - overall height of frame and spool 89 inches.

1 Nov 2003 - Oct 31 2004	Nov 2004 – Oct 2005	Nov 2005 – Oct 2006
\$ _____ each	\$ _____ each	\$ _____ each

(Estimated quantity 2 per 12 month period)

4. Power Pack (Diesel Hydraulic);
  - [Kubota] Water cooled diesel engine Model #Z482-E (minimum 9 HP, 3200 rpm) or equal
  - Electric Start
  - Engine and Reel Speed Controls
  - Variable Speed Remote reel control for (in and out) c/w 25 ft. cable

- Relief Valve to open at 2000 psi
- Hydraulic reservoir approximately 26 gallons
- Weather Tight cover for storage

1 Nov 2003 – Oct 31 2004	Nov 2004 – Oct 2005	Nov 2005 – Oct 2006
\$ _____ each	\$ _____ each	\$ _____ each

(Estimated quantity 2 per 12 month period)

5. Layflat inshore harbour pollution boom 24 inch; made of a PVC type material, freeboard, 8 inch plus or minus 0.500 inch, draft, 16 inch plus or minus 1.000 inch. Weight approximately 1.75 pound per foot, high visible yellow; boom stenciled with the standard 2.000 inch letters gloss black in colour showing “DND 01-1”. Boom is to be made in 50 foot sections and is to have a top tension strap, ballast chain and flat foam floatation built in. The ballast chain pocket is to be double lined to prevent wear and to add strength. Boom is to be complete with joiners (complete with grapple hook loop attached to the top end) to make one section. Joiners are to have foam floatation attached to both sides. Boom sections are to have D-tabs attached to tension strap and ballast chain ends to facilitate using the joiners. Joiners are to come complete with 2 spring tension toggle pins 2.625 inches long. Toggle pins are to be made of stainless steel. There shall be one pin on the top and one pin on the bottom of each joiner opposite sides, with stainless steel bolts and nylock nuts in the other holes.

Material construction:

Base Fabric Weight . . . . .	163 g/m <sup>2</sup> as minimum
High tenacity Weft Inserted Filament Size. . . . .	1000 denier
Physical properties; Grab Tensile. . . . .	1887 x 1776N
Trapezoid Tear. . . . .	244 x 244N
Cold Crack (method 5874@-67). . .	no cracking or flaking
Excellent UV and Abrasion Resistance	

1 Nov 2003 – Oct 31 2004	Nov 2004 – Oct 2005	Nov 2005 – Oct 2006
\$ _____ per 50 feet	\$ _____ per 50 feet	\$ _____ per 50 feet

(Estimated Usage 3000 feet per 12 month period)

6. Miscellaneous Related Items, Estimated to be 10% of the overall value of the standing Offer. Current price list in effect at time of ordering less a discount of \_\_\_\_\_%.
  
9. A clause on page 5 of the RFSO, under “EQUIVALENTS”, describes the procedure to follow if the bidder is not offering the precise products requested; it reads as follows:
  1. Products that are equivalent in form, fit, function and quality will be considered where the Bidder:
    - (a) designates the brand name, model and/or part number of the equivalent product being substituted;
    - (b) states that the substitute is fully interchangeable with the item specified;
    - (c) provides complete specifications and descriptive literature for each substitute item, as well as be prepared to provide sample of the products offered.
    - (d) provides compliance statements that include technical specifics showing the substitute item meets all mandatory performance criteria that are specified in the solicitation; and
    - (e) clearly identifies those areas in the specifications and descriptive literature that support the substitute items compliance with any mandatory performance criteria.



2. Products offered as equivalent in form, fit, function and quality will NOT be considered if:
  - (a) the bid fails to provide all the information requested to allow the Contracting Authority to fully evaluate the equivalency of each substitute item; or
  - (b) the substitute item fails to meet or exceed the mandatory performance criteria specified in the solicitation of that item.

10. Eight proposals were received, including one from Canadyne. In its cover letter, Canadyne indicated that the “products offered in the solicitation comply 100% with the supplied specifications” and filled in the spaces provided in the RFSO for the proposed prices. On October 3, 2003, PWGSC sent facsimile messages to a number of bidders, including Canadyne, requesting that they clarify their proposals. Canadyne responded to PWGSC on October 16, 2003, by providing information about the specific products that it was offering and reiterating the following: “We certify that all items offered conform to the specifications in the R[F]SO.” PWGSC determined that POL-E-MAR had submitted the responsive proposal with the lowest price and, on October 30, 2003, it issued the standing offer to POL-E-MAR.

11. On January 8, 2004, through MERX,<sup>2</sup> Canadyne became aware that POL-E-MAR had been issued the standing offer and contacted PWGSC by phone, asking for details. PWGSC responded by e-mail on January 9, 2004, confirming that POL-E-MAR was the lowest responsive bidder and provided Canadyne with the reasons for having rejected its proposal.

12. On January 16, 2004, Canadyne filed its complaint with the Tribunal.

## **POSITIONS OF THE PARTIES**

### **Canadyne’s Position**

13. Canadyne submitted that its proposal was compliant with the mandatory specifications for all items listed in the RFSO and that its proposal clearly indicated that its proposed equipment complied 100 percent with all specifications. Canadyne also submitted that it re-affirmed that it would meet the specifications when it responded to PWGSC’s October 3, 2003, request for additional information and that the cover sheet of its response certified that all items offered conformed to the specifications of the RSFO. According to Canadyne, its statements claiming that it met all technical requirements 100 percent should have, by themselves, ensured that it would not be disqualified for technical reasons.

14. Canadyne submitted that the evaluation conducted by DND made a number of significant incorrect assumptions about the information that Canadyne provided and that these errors run counter to the onus that the contracting authority exercise due diligence in its evaluation of bids. Canadyne submitted that, on a tender of this size, the technical authority could easily have requested clarifications.

### **PWGSC’s Position**

15. PWGSC submitted that Canadyne’s own statements in the complaint provide direct evidence that it knowingly and deliberately chose not to provide PWGSC with effective substantiation of its claim that the offered goods were compliant with the mandatory specifications. PWGSC submitted that Canadyne stated that the rationale for not providing such substantiation is that it was afraid that the provision of such details might result in its disqualification for technical reasons.

---

2. Canada’s Electronic Tendering Service.

16. PWGSC submitted that the Crown, as the customer, has the fundamental right and duty to ensure that the supplier's goods and services satisfy the Crown's stated requirements. It submitted that, in the past, the Tribunal has reminded suppliers that the onus is on them to respond to and meet the criteria established in a solicitation.<sup>3</sup> PWGSC also submitted that Canadyne argued that it should be relieved of this obligation, since there is a risk that it might make a mistake. PWGSC submitted that all participants in the procurement process have significant duties and obligations and that there is always a risk of error. PWGSC submitted that all parties have an obligation to exercise due diligence to meet their responsibilities under the process and that this obligation falls on Canadyne, as it would on any other supplier.

17. PWGSC argued that the RFSO set out detailed mandatory specifications with respect to the five types of equipment contained therein. PWGSC noted that Canadyne's original proposal did not include any information describing the goods being offered. Instead, the proposal merely stated: The "products offered in the solicitation comply 100% with the supplied specifications."<sup>4</sup> PWGSC submitted that, in response to its request for further information on the products being offered, Canadyne provided PWGSC with a listing, by part number, of the goods being provided, as well as three one-page brochures. PWGSC submitted that this information fell far short of meeting the information requirements for equivalent products set out in the RFSO.

18. PWGSC submitted that the evaluation of all proposals was conducted fairly and in compliance with the RFSO and the procurement disciplines of the *Agreement on Internal Trade*,<sup>5</sup> the *North American Free Trade Agreement*<sup>6</sup> and the *Agreement on Government Procurement*.<sup>7</sup> It further submitted that the standing offer was issued appropriately, that the complaint ought to be dismissed and that the Crown should be awarded its costs.

## TRIBUNAL'S DECISION

19. 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>8</sup> further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *AIT*, *NAFTA* and the *AGP*.

20. 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."

21. Article 1013 of *NAFTA* provides, in part, that "[w]here an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive

---

3. See, for example, *Re Complaint Filed by Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Re Complaint Filed by Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

4. Canadyne's proposal dated September 30, 2003, cover page.

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

6. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

7. 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)> [*AGP*].

8. S.O.R./93-602.

tenders. . . . The documentation shall also include . . . the criteria for awarding the contract, including any factors other than price that are to be considered”.

22. Article XII of the *AGP* provides, in part, that “[t]ender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including . . . the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders”.

23. The Tribunal notes that the RFSO includes the following stipulation: “It is mandatory that items conform to the specifications as indicated.” In addition, the Tribunal notes that the RFSO includes a section for “equivalents”, which identifies the requirements to be met when a bidder proposes equivalent products. Among these requirements is the need to provide complete specifications and descriptive literature for each substitute item, as well as to be prepared to provide samples of the products offered. However, the Tribunal was unable to find, anywhere in the RFSO, any requirement for a bidder not proposing an equivalent product to provide additional information, such as specifications or descriptive literature. Nor does the RFSO indicate that the contracting authority may request such information when a bidder is proposing a product that conforms to the specifications indicated in the RFSO.

24. Indeed, it is clear to the Tribunal that, by filling in the pricing lines located under items 1 to 5 and the blank percentage line in item 6, a bidder commits to offer exactly what is being requested. The Tribunal notes that Canadyne, in addition to filling in the blanks correctly, took the extra step of including in its cover letter the statement that products “comply 100% with the supplied specifications.”

25. Canadyne’s proposal was disqualified based on the additional information requested by PWGSC. The following reasons were provided:

Not acceptable, there is no mention of our specs. Items are not what we require. Item 1 appears to be self inflating not flat. Item 2 is not what was requested, comes with power pack. Item 3 not [Kubota] water cooled diesel engine.<sup>9</sup>

26. The Tribunal is of the opinion that, in the absence of a provision in the RFSO advising bidders that additional information could or would be requested and subsequently used in the evaluation of proposals, PWGSC was not entitled to use additional information of such a substantive nature in the evaluation of proposals. PWGSC’s actions go far beyond the use of a minor clarification process. Moreover, in light of the format stipulated in the RFSO, a bidder should have been deemed to meet the specifications indicated simply by filling in the pricing lines located under items 1 to 5 and the blank percentage line in item 6. Therefore, the Tribunal is of the view that PWGSC clearly departed from the terms of the RFSO by using the additional information to disqualify Canadyne’s proposal.

27. The Tribunal also finds that the evaluators were proceeding with their evaluation as if Canadyne had proposed equivalent products, which is not supported by the wording contained in Canadyne’s bid. Had Canadyne’s proposal indicated that it was offering equivalent products and had Canadyne failed to provide the additional information required, its proposal could have been disqualified. However, PWGSC requested information from a number of bidders and Canadyne provided what was requested and never indicated in its original bid nor in the additional information that it was providing anything other than what was specified. The Tribunal notes that DND appeared to have been expecting detailed information in accordance with the “EQUIVALENTS” section of the RFSO, as evidenced by the comment “there is no mention of our specs.” The Tribunal notes that, as part of the items being sought, the descriptions only specify a single brand name

---

9. GIR, Exhibit 8, public version.

“[Kubota]” for item 4, the power pack. It would seem to the Tribunal that this would be the only element to which the clauses relating to equivalency may have applied. On this particular item, the RFSO required a “[Kubota] Water cooled diesel engine Model #Z482-E . . . or equal”. Although the evidence indicates that Canadyne offered the “Canadyne PowerPack Model DH10-YSC”, nothing in Canadyne’s bid nor in the information that was later provided indicates that the power pack proposed would not be equipped with a “[Kubota] Water cooled diesel engine Model #Z482-E”. To the contrary, Canadyne’s proposal indicates “products . . . comply 100% with the supplied specifications.”

28. In light of the above, the Tribunal finds that PWGSC breached the provisions of the trade agreements in disqualifying Canadyne’s proposal and that the complaint is valid.

29. In recommending the appropriate remedy, the Tribunal considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*. The Tribunal finds that the misapplication of parts of the RFSO is a serious deficiency, one that has brought the overall integrity of this competitive procurement process into question. The Tribunal’s recommendation is stated below.

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

30. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

31. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC re-evaluate all proposals submitted in response to Solicitation No. W010A-04AG12/A in accordance with the requirements set out in the RFSO. In this regard, the re-evaluation of the proposals would be based strictly on the information provided by bidders in their initial proposals. In other words, unless the proposal explicitly indicates that the offer deviates from the specification or proposes equivalent products, the items proposed should be assumed to conform to the specifications of the RFSO.

32. If the re-evaluation indicates that the standing offer should have been issued to a supplier other than POL-E-MAR, the Tribunal recommends that PWGSC cancel the standing offer issued to POL-E-MAR and award it to the lowest responsive bidder. If Canadyne is identified as having submitted the lowest responsive bid, the Tribunal recommends that it be compensated for the profit that it would have earned on all call-ups that have already been placed with POL-E-MAR. The compensation for lost profit would be calculated based on the prices being offered by Canadyne in its proposal for the items that have been purchased under any call-ups.

33. If, within 30 days from the completion of a re-evaluation that identifies Canadyne as having provided the lowest responsive bid, the parties are unable to reach an agreement for compensation that recognizes that Canadyne should have been awarded the standing offer and would have had the opportunity to profit therefrom, Canadyne should file a submission with the Tribunal in accordance with the *Procurement Compensation Guidelines*.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member