



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-001

CVDS Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, June 30, 2004*

*Reasons issued
Friday, July 16, 2004*

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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*.

BETWEEN

CVDS INC.

Complainant

AND

**THE 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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by CVDS Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Pierre Gosselin

Pierre Gosselin
Presiding Member

Ellen Fry

Ellen Fry
Member

Meriel V. M. Bradford

Meriel V. M. Bradford
Member

Hélène Nadeau

Hélène Nadeau
Secretary

The statement of reasons will follow at a later date.

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STATEMENT OF REASONS

COMPLAINT

1. On April 1, 2004, 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*.¹ The complaint concerned the procurement (Solicitation No. 21120-027693/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Correctional Service of Canada (CSC), for the supply and installation of a covert telephone interception system.

2. CVDS alleged that the technical specification in the Request for Proposal (RFP) was drafted in terms of design and descriptive characteristics instead of performance characteristics, as required by the trade agreements. It also alleged that its proposed equipment met all the mandatory requirements and was significantly less expensive than the equipment proposed by Cartel Communications System Inc. (Cartel), the successful bidder.

3. CVDS requested, as a remedy, that PWGSC cancel the contract awarded to Cartel and recognize CVDS as the lowest compliant bidder. CVDS further requested that it be awarded its reasonable costs incurred in responding to the solicitation and in preparing and proceeding with the complaint.

4. On April 16, 2004, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² The Tribunal informed the parties that it would only investigate allegations relating to the evaluation and disqualification of CVDS's proposal. The Tribunal ruled that allegations concerning the drafting of the specification had not been brought to the Tribunal's attention within the time frame required by the trade agreements and the *Regulations*. On April 23, 2004, CVDS provided additional information relating to the complaint, which was accepted by the Tribunal, and a copy was sent to PWGSC on May 7, 2004. On May 11, 2004, PWGSC filed a Government Institution Report (GIR) with the Tribunal. On May 21, 2004, CVDS filed its comments on the GIR. On June 2, 2004, PWGSC submitted a request for portions of CVDS's comments on the GIR to be set aside, as PWGSC argued that the portions in question were either new grounds that should have been included with the original complaint or an attempt to supplement the text of CVDS's proposal. On June 9, 2004, after having reviewed PWGSC's request, the Tribunal informed PWGSC and CVDS that it did not agree with PWGSC's characterization of the comments and did not accept PWGSC's correspondence on the record.

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 Notice of Proposed Procurement and RFP were issued by PWGSC, on behalf of the CSC, on October 3, 2003, with a closing date for the receipt of bids of October 20, 2003. There were two amendments issued, the first to extend the bid receipt date by a week, to October 27, 2003, and the second to

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

2. S.O.R./93-602 [*Regulations*].

correct a formatting error in the RFP. There were also a number of solicitation updates published on MERX.³

7. Section A of the RFP reads, in part, as follows:

A.1 Requirement Categories (I)

Elements of this RFP are categorized as either “Mandatory”, “Rated”, or “Information”, and are identified as follows:

i) **Mandatory Requirements:**

Where an element of this RFP, which includes all Annexes, is mandatory it will be identified specifically with the word “**Mandatory**”, an “**(M)**”, or with a statement covering a section of this document. The words, “**shall**”, “**must**”, “**essential**” and “**will**”, in this RFP, are to be interpreted as mandatory requirements. Failure to comply with a mandatory requirement will result in elimination of a proposal from further consideration.

iii) **Information Elements:**

Where an element of this RFP, which includes all Annexes, is provided for information purposes, it will be identified specifically with the word “**Information**”, an “**(I)**”, or with a statement covering a section. An information element is used to:

- Indicate a requested solicitation criterion to Bidders;
- Provide information to Bidders; and/or
- Identify information or documentation that will not be evaluated or rated.

8. Annex “A” to the RFP, “Statement of Work” (SOW), reads, in part, as follows:

5. Technical Requirements (M)

- b. The Interception system must have the capacity to monitor a minimum of twelve incoming telephone or visit lines and permit expansion in fixed increments up to 96 lines in a single cabinet system.
- c. The Interception system must convert the audio to digital format, and store the recordings on a hard disk for immediate retrieval.
- d. The Interception system must provide Automatic Gain Control (AGC) on the recording inputs such that low signal levels are increased in volume, and high signal levels are reduced to compensate for the difference in signal levels between the inmate and the called party.
- s. The Interception system must provide the ability to listen to any call in progress whether it is a Targeted Inmate or not.
- v. The Interception system must provide both audio speakers with volume control and headphones for listening to recordings and monitored telephone calls.

9. According to PWGSC, seven proposals were received, two of which were judged to be non-compliant for failure to meet the Canadian content requirements of the RFP. Of the five remaining bids, three, including that of CVDS, were evaluated as non-responsive to one or more of the mandatory requirements. In that regard, on January 21, 2004, PWGSC requested that CVDS identify “[w]here in [its] proposal . . . it indicated that the proposed system provides for Automatic Gain Control on the recording

3. Canada’s electronic tendering service.

input.” On January 22, 2004, CVDS provided its response to PWGSC, and PWGSC forwarded the information to the technical authority at the CSC. On March 12, 2004, PWGSC awarded the contract to Cartel.

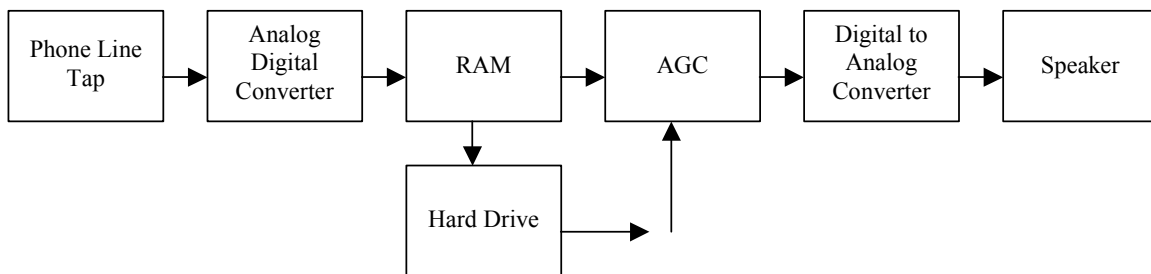
10. On March 18, 2004, CVDS was informed that its bid had been found non-compliant with mandatory technical requirement 5d of the SOW. CVDS called PWGSC that same day and arranged a meeting with PWGSC and CSC staff for April 14, 2004, to discuss its proposal. On March 22, 2004, CVDS wrote to PWGSC requesting that it suspend work on the subject contract or CVDS would be forced to demand a ministerial inquiry or “bring the matter public”. On March 23, 2004, PWGSC informed CVDS that it had received its letter, but that PWGSC’s position had not changed, and it reconfirmed that CVDS’s proposal was evaluated fairly and had properly been determined non-compliant with mandatory technical requirement 5d.

11. CVDS submitted its complaint to the Tribunal on April 1, 2004.

POSITIONS OF THE PARTIES

CVDS’s Position

12. CVDS submitted that its system is designed to preserve the integrity of the original recording, so that the original recording inputs are preserved (stored on a hard disk) and the AGC function is applied, if required, before playback. It submitted that the real-time playback output of its system is drawn instantaneously from Random Access Memory (RAM), as per the chart below. CVDS argued that, in cases where the government will seek to introduce a recording as evidence in court, it will have the burden of proving the authenticity of the recording, in which case CVDS’s system design respects the common law and statutory best evidence rule. It also submitted examples of other customers’ RFPs that required the recording of true line inputs.⁴



13. CVDS submitted that its bid had been improperly evaluated, based on an erroneous assumption by PWGSC and the CSC that its system can only provide AGC on recorded conversations that are replayed after the fact. It submitted that its system can provide AGC on any audio, whether live or stored, that the user requests to hear. It submitted that PWGSC mistakenly interpreted the term “playback”, as it was written in its proposal, to mean “after the fact” recorded conversations. It submitted that the term “playback” is better described as meaning “listening to”. It submitted that “playback”, using modern digital recording systems, means listening to conversations that are one month, one day, one hour, one minute, one second or portions of a second old.

14. CVDS also submitted that the SOW does not require the AGC to be applied to the monitoring of live conversations. It noted that section 4a of the SOW, while describing the existing equipment, explained

4. CVDS’s comments on the GIR, exhibits O, P, Q, R, S, T and U.

that the covert telephone interception system is used to monitor calls as they happen, but that this section was identified as an information element, not a mandatory one, in accordance with section A.1 of the RFP.

15. CVDS submitted that its system design allowed it to meet mandatory technical requirement 5c of the SOW, which required the system to “convert the audio to digital format, and store the recordings on a hard disk for immediate retrieval.” It argued that any system that applies AGC before storing the recording inputs on the hard drive is not storing the true input and should, therefore, have been declared non-compliant.

16. CVDS submitted that the issue concerning placement of the AGC, as provided for in technical requirement 5d of the SOW, is a latent ambiguity and that the Tribunal has ruled that latent ambiguities not discovered until after bid closing may constitute a justifiable ground for filing a complaint.⁵ It argued that it could not have become aware of this issue before the results of the final evaluation. It submitted that, if such a narrow interpretation as applied by PWGSC was intended by the technical authority, then the requirement should have read either that the AGC must be applied in the input module or that the recording inputs must not be recorded at their true levels.

PWGSC’s Position

17. PWGSC submitted that technical requirement 5d of the SOW clearly states that the interception system “must provide Automatic Gain Control (AGC) on the recording inputs”. It submitted that the recording inputs are the original sound signals being input into the recording and monitoring system, before it is recorded, digitized or otherwise stored by electronic and/or computer equipment. It submitted that CVDS’s complaint does not dispute that its proposed system applies the AGC function during playback.⁶

18. PWGSC submitted that there is nothing in the RFP to indicate that the primary focus of the interception system is the collection of recorded evidence in accordance with the common law and statutory best evidence rule, as alleged by CVDS. It submitted that the SOW clearly indicates that the surveillance, monitoring and recording of conversations of targeted inmates are the purposes of the interception system. PWGSC submitted that it is the monitoring of actual conversations in true time that enables corrections officers to be alerted to attempts to provide inmates with contraband (weapons, drugs, etc). It submitted that the SOW contained mandatory technical requirements 5b, 5s and 5v, which indicate the importance of the monitoring function of the interception system.

19. PWGSC submitted that, contrary to CVDS’s argument, the RFP did not contain a requirement to store an unmodified recording in digital format. It submitted that technical requirement 5c of the SOW simply requires that the interception system convert the audio signal into digital format for storage on a hard drive. It also noted that this argument was submitted by CVDS after its complaint had been filed and after the time for submitting a complaint on this specific issue had expired.

20. PWGSC also submitted that certain information provided by CVDS during the complaint process attempted to supplement its proposal and/or was deliberately prepared in contemplation of this litigation. It submitted that the fundamental issue before the Tribunal is whether it was reasonable for the evaluators to have determined that CVDS’s technical proposal was non-compliant, based solely on the information contained in CVDS’s bid. It submitted that the technical evaluators were, in fact, correct when they disqualified CVDS’s proposal.

5. *Re Complaint Filed by Cifelli Systems Corporation* (21 June 2001), PR-2000-065 (CITT).

6. Complaint at 10-11.

21. PWGSC requested that the complaint be dismissed and that it be awarded its costs.

TRIBUNAL'S DECISION

22. 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 applicable trade agreements, which, in this case, is the *Agreement on Internal Trade*.⁷ As per Annex 1001.2b of the *North American Free Trade Agreement*⁸ and Annex 1, Canada, Appendix 1 of the *Agreement on Government Procurement*,⁹ *NAFTA* and the *AGP* do not apply, as Canadian federal government procurement coverage is excluded for the goods and services being procured, as they fall under Federal Supply Classification Code 58.

23. Article 506(6) of the *AIT* reads, in part as follows:

The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

24. The issue before the Tribunal is whether PWGSC evaluated CVDS's proposal in accordance with the provisions of the RFP and the *AIT* when it determined that CVDS's proposed telephone interception system did not meet mandatory technical requirement 5d of the SOW, i.e. that "[t]he [i]nterception system must provide Automatic Gain Control (AGC) on the recording inputs".

25. The Tribunal notes that section A.1 of the RFP stipulated the following: "Failure to comply with a mandatory requirement will result in elimination of a proposal from further consideration." The Tribunal also notes that section 5 of the SOW, entitled "Technical Requirements", is marked as "M" (mandatory). Thus, the Tribunal finds that the failure of a bidder to comply with technical requirement 5d of the SOW must lead to the disqualification of that bidder's proposal.

26. The Tribunal does not consider that mandatory technical requirement 5d of the SOW contained a "latent defect", as was argued by CVDS. While it is possible that technical requirement 5d could have been written more clearly, in the Tribunal's view, any ambiguity was as evident when the RFP was issued as when CVDS learned of the results of the bid evaluation. Consequently, CVDS did not complain about the ambiguity of technical requirement 5d within the time frame prescribed by section 6 of the *Regulations*, and the Tribunal does not have jurisdiction to consider this ground of complaint.

27. Technical requirement 5d of the SOW requires that AGC be provided "on the recording inputs". The Tribunal interprets this to mean that the AGC is to be added **before** the data is stored in any fashion. The Tribunal finds that common usage of the word "input", in addition to the examples provided by PWGSC in the GIR,¹⁰ demonstrates that this is the interpretation of the wording of the RFP that the evaluators should reasonably have applied when reviewing the proposals. The Tribunal is of the opinion that for PWGSC to adopt the different interpretation advanced in CVDS's bid and response to PWGSC's request for clarification would have required the evaluators to expand the interpretation of the words "recording inputs" significantly beyond their reasonable scope. Consequently, the Tribunal does not consider that PWGSC evaluated CVDS's proposal in a manner that contravened the wording of the RFP, and the Tribunal is of the view that PWGSC was correct to disqualify CVDS's proposal on this basis.

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

8. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

9. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

10. Argument and Response to the Complaint, para. 7.

28. The Tribunal notes that CVDS submitted, in its comments on the GIR, seven examples¹¹ of other tender documents in which data were clearly required to be stored in an unaltered format. However, in the case before the Tribunal, the wording and provisions contained in those seven other solicitations are not at issue. The Tribunal must confine itself to the contents of this solicitation.

29. Accordingly, the Tribunal finds that the complaint is not valid and awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by CVDS.

30. In determining the amount of the cost award in this complaint, the Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*. The Tribunal's preliminary view is that this complaint case has a level of complexity that corresponds to the medium level of complexity referred to in Appendix A of the *Guideline* (Level 2). The *Guideline* contemplates classification of the level of complexity of complaint cases based on the following three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. The complexity of the procurement itself was medium, as it involved the installation and maintenance, on multiple sites, of off-the-shelf items. The complexity of the complaint was also medium, in that it involved significant argument on the proper interpretation of a technical specification of the RFP. Finally, the complexity of the proceedings was also medium, as there were minor submissions beyond the scope of normal proceedings, including one motion, and a public hearing was not required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

DETERMINATION OF THE TRIBUNAL

31. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

32. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by CVDS. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

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Presiding Member

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Member

11. CVDS's comments on the GIR, exhibits O, P, Q, R, S, T and U.