



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-036

Danbar Enterprises

v.

Department of Public Works and
Government Services

*Determination issued
Tuesday, January 18, 2005*

*Reasons issued
Tuesday, January 25, 2005*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS 1

 COMPLAINT 1

 PROCUREMENT PROCESS..... 2

 POSITIONS OF THE PARTIES 3

 PWGSC’s Position 3

 Danbar’s Position..... 4

 TRIBUNAL’S DECISION..... 4

 DETERMINATION OF THE TRIBUNAL 6

IN THE MATTER OF a complaint filed by Danbar Enterprises 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

DANBAR ENTERPRISES

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 Danbar Enterprises. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint 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 in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Patricia M. Close

Patricia M. Close
Presiding Member

Pierre Gosselin

Pierre Gosselin
Member

Ellen Fry

Ellen Fry
Member

Hélène Nadeau

Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

Tribunal Members: Patricia M. Close, Presiding Member
Pierre Gosselin, Member
Ellen Fry, Member

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Eric Wildhaber

Complainant: Danbar Enterprises

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
Susan D. Clarke
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) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On October 22, 2004, Danbar Enterprises (Danbar) 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. M9020-043254/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for the supply of vehicular closed-circuit video equipment (VCCVE).

2. Danbar alleged that PWGSC and the RCMP biased certain technical specifications in the Request for a Standing Offer (RFSO) in favour of Mobile-Vision, Inc.'s System 7TM, thereby unjustly limiting the bidding process. Specifically, these requirements were that any system proposed by a supplier must include a tape counter, a two-key system to secure the VCR vault, a flashing alphanumeric stamp on the video display, automatic illumination intensity control for the overhead console display, camera zoom control located in the overhead console and the automatic shut-off of the speaker if the in-car microphone is activated.

3. In its comments on the Government Institution Report (GIR), received on December 3, 2004, Danbar submitted that two additional requirements were overly restrictive: the heating/cooling system must be on when the system is off and there should be an electronics slide-out tray. The Tribunal is of the view that these grounds should reasonably have been known by Danbar at the time at which it received the specifications of the RFSO. According to the complaint, this was on or about September 21, 2004, therefore, the Tribunal finds that these grounds were filed beyond the time limit imposed by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² and, accordingly, they will not be addressed.

4. Danbar requested, as a remedy, that the RFSO be modified by changing the disputed mandatory requirements to desirable options.

5. On October 27, 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 *Regulations*. Pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal issued a postponement of award order. On November 22, 2004, PWGSC filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On December 3, 2004, Danbar filed comments on the GIR.

6. 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.

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

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

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

PROCUREMENT PROCESS

7. On September 16, 2004, PWGSC issued an RFSO with respect to this procurement. Appendix "A" of the RFSO identifies the mandatory requirements. The specific requirements at issue read in part as follows:

4.1.3 The VCCVE system must, as a minimum, record onto the tape and display on the monitor the following data;

(c) tape counter

4.1.6 The placement of the alphanumeric data on the VCCVE system must be modifiable. It must, at minimum, be capable of two locations on the screen. Typically either the bottom or top of the screen. As well, being capable of flashing on and off of the screen will allow a person reviewing the tape to see information that may be hidden. This feature may have a mechanical "lockout" to reduce the risk of unauthorized alteration of the programmed alphanumeric data appearing on the screen.

4.4.5 The control center must provide a programmable control button which will allow the user to program the zoom lens to a predetermined focal length for a specific length of time (3 55 seconds) and then return to its previous state.

4.4.8 The indicators shall include non-glare illumination for night viewing. Automatic control of the intensity of the indicator illumination must be provided. A photocell control circuit may be used for automatic intensity illumination control.

4.5.3 In order to readily determine if videotapes used on a system have been tampered with, the recorded signal must contain a time, date and a tape counter stamp.

4.7.2 Vault mounting shall be accomplished by using a slide-in plate that is typically bolted to the trunk floor. A keyed lock shall be provided to secure the vault to its mounting plate, and to ensure against unauthorized removal. The keyed locking device must be protected from shifting or moving objects in the trunk area.

4.8.20 When the in-car microphone is switched on, the monitor's speaker must automatically turn off. This shall prevent feedback and insure that recorded conversations will not be heard over the monitor's speaker.

8. On September 21, 2004, Danbar sent an e-mail to PWGSC objecting to the inclusion of the above-quoted technical specifications in the mandatory requirements.

9. On September 29, 2004, Danbar inquired about the status of a response to the points that it had raised in its e-mail of September 21, 2004. PWGSC responded the same day, indicating that it was still awaiting a full response from the RCMP. On October 4, 2004, PWGSC issued amendment No. 1 to the RFSO extending the closing date of the solicitation from October 7 to November 8, 2004.

10. On October 5, 2004, PWGSC provided a response to Danbar with respect to its objection of September 21, 2004. In its response, PWGSC denied that the specifications targeted the Mobile-Vision, Inc.'s product. Later, on October 5, 2004, Danbar sent an e-mail to PWGSC reiterating its objection. On October 6, 2004, PWGSC responded to Danbar's e-mail by stating that other manufacturers could provide these features on their systems.

11. On October 7, 2004, Danbar advised PWGSC that it was still dissatisfied with the inclusion of the mandatory technical specifications at issue. On October 19, 2004, PWGSC sent an e-mail to Danbar including a series of questions from the RCMP seeking further information from Danbar. On the same day,

Danbar responded by e-mail to the RCMP's questions. On October 22, 2004, Danbar filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

PWGSC's Position

12. PWGSC submitted that the mandatory technical requirements at issue reflect the legitimate operational requirements of the RCMP and that, as such, the Crown is entitled to include such requirements in this solicitation.

13. PWGSC submitted that it has been well established by the Tribunal that the Crown is entitled to set its own reasonable requirements in a solicitation process. PWGSC also submitted that the Tribunal has indicated in previous cases that procuring entities are not required to compromise their legitimate operational requirements in order to accommodate the supplying community or a particular supplier.

14. PWGSC submitted that the tape counter is a critical anti-tampering device because it is not accessible to the officer in question. PWGSC further submitted that at least four manufacturers provide a tape counter feature with their products.

15. With respect to the requirement for a separate keyed lock to secure the system vault, PWGSC submitted that it is the RCMP's operational practice that the first key for VCR access is held by the officer, while the second is retained by the supervisor responsible for inventory tracking and maintenance. According to PWGSC, the fact that the supervisor retains the second key ensures that the officer is not in a position to unilaterally remove the vault from the vehicle. PWGSC submitted that two manufacturers offer a two-key system with their products.

16. With respect to the requirement for a flashing alphanumeric stamp, PWGSC submitted that it is important that the text display be in a flashing mode so that the entire video image is available for evidentiary purposes. PWGSC also submitted that at least two manufacturers have the flashing alphanumeric stamp feature for their products.

17. PWGSC submitted that automatic illumination intensity control provides a higher level of safety to officers while on duty. PWGSC also submitted that at least three manufacturers offer such automatic control functions with their systems.

18. With respect to the requirement that the programmable zoom control button for the camera be located on the overhead control console, PWGSC submitted that, by lessening the level of distraction, the officer's safety is enhanced. PWGSC also submitted that at least two manufacturers provide a zoom control on an overhead console.

19. With respect to the specification in the RFSO regarding the automatic shut-off of the monitor's speaker when the in-car microphone is switched on, PWGSC submitted that requiring such a cut-off of the speaker system prevents the sudden occurrence of a loud distracting feedback noise and a safety risk to an officer is thus eliminated. PWGSC also submitted that, where the recording of suspects is being initiated in the rear seat and the officer is required to simultaneously deal with other suspects outside the vehicle, the audio transmitted by the officer's wireless microphone might be heard inside the vehicle if the speaker were not off. PWGSC submitted that at least two manufacturers offer such an automatic speaker cut-off function with their systems.

20. PWGSC requested that the Crown be awarded its costs in the matter.

Danbar's Position

21. Danbar submitted that, prior to the RFSO being posted, the RCMP had approved, for its use, three in-car camera systems (Mobile-Vision, Inc.'s, Kustom Signals, Inc. and Prosecutor of Texas, LLC). Danbar further submitted that, when the RFSO was posted, Mobile-Vision, Inc.'s System 7TM was the only VCCVE which could meet all the technical mandatory requirements and that, although other manufacturers have apparently been able to meet certain technical requirements by altering their existing systems, only Mobile-Vision, Inc.'s System 7TM met all the mandatory requirements from the outset. Danbar submitted that there was thus a biasing of technical specifications in favour of Mobile-Vision, Inc.'s System 7TM.

22. Danbar submitted that, on September 29, 2004, it was informed by PWGSC that one company had requested an extension to November 22, 2004. Danbar submitted that the extension was requested in order for that company to alter an existing system to meet the mandatory technical requirements. Danbar further submitted that, in response to a request for clarification, the RCMP indicated that it was its understanding from reviewing different systems that more than one system could meet the specification. However, Danbar submitted that, although these systems could meet specific technical specifications by November 22, 2004, they may not have been able to meet them when the RFSO was posted.

23. Danbar submitted that the mandatory specifications of the RFSO are just one of the ways in which operational requirements can be met. Danbar suggested that there is at least one additional way in which these legitimate operational requirements can be accomplished. Danbar submitted that its complaint is based solely on the mandatory technical specifications of the RFSO and that these technical specifications were so specific to Mobile-Vision, Inc.'s System 7TM, at the time of posting, that it unjustifiably eliminated the competitive bidding process, thereby forcing the alteration of the competitor's systems.

24. With respect to the flashing alphanumeric stamp, Danbar advised that its system can now comply with this mandatory requirement and it no longer seeks an exemption.

25. In response to PWGSC's point that at least two manufacturers appear to have an automatic speaker cut-off function, Danbar submitted that Mobile-Vision, Inc. was not mentioned, but can also provide this feature.

26. Danbar submitted that the biasing of technical specifications in favour of Mobile-Vision, Inc.'s System 7TM have led to the unjustifiable exclusion of Danbar from tendering.

TRIBUNAL'S DECISION

27. 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*.⁴

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

28. In its complaint, Danbar claimed that PWGSC and the RCMP failed to properly follow Articles 504(3)(b) and (g) of the *AIT*.

29. Article 504(3) of the *AIT* provides in part that the Federal Government (except as otherwise provided in Chapter Five of the *AIT*) is prohibited from taking the following measures:

(b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;

(g) the unjustifiable exclusion of a supplier from tendering.

30. Danbar alleged that, when the RFSO was posted, Mobile-Vision, Inc.'s System 7TM was the only VCCVE which could meet all the technical mandatory requirements. Specifically, it identified particular mandatory requirements found in the RFSO that, Danbar contended, biased the procurement in favour of Mobile-Vision, Inc.'s System. 7TM.

31. With respect to Danbar's allegation that the technical requirements of this procurement were overly restrictive, the Tribunal is of the opinion that, while it would have been preferable if these specifications had been drafted in terms of performance criteria rather than descriptive or design criteria, the evidence does not indicate any bias in the minds of PWGSC or RCMP officials in favour of Mobile-Vision, Inc.'s System 7TM at the time when the specifications were prepared.

32. PWGSC submitted that at least two suppliers⁴ other than Mobile-Vision, Inc. could meet all the specifications in question at the time of bid closing. Danbar did not contradict this submission. Danbar maintains that no other producer could meet the specifications at the time of the posting of the RFSO; however, it presented no such evidence to the Tribunal. Therefore, the evidence does not indicate that the specifications that were prepared were biased in favour of Mobile-Vision, Inc.'s System 7TM. The fact that two other producers were able to bid, whether or not this required alterations to their products, leads the Tribunal to conclude that there was a competitive process. Indeed, the evidence did not indicate that it was impossible for Danbar to also have altered its product to meet the bid specifications. Based on the foregoing analysis, the Tribunal does not consider that Danbar was unjustifiably excluded from tendering.

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

34. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*, which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this case has a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline* (Level 2). The procurement was of medium complexity, as the system being purchased, although itself technically complex, was mostly an off-the-shelf product. In addition, the complaint itself was of medium complexity, given the issues concerning multiple technical requirements in the RFSO. Finally, the complexity of the complaint proceedings was relatively low, as there were no interveners and no motions, no public hearing was held and the complaint was resolved within 90 days of the filing of the complaint, as provided for in paragraph 12(a) of the *Regulations*. Accordingly, as contemplated by its *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

DETERMINATION OF THE TRIBUNAL

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

36. 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 Danbar. The Tribunal's preliminary indication of the level of complexity for this complaint 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Patricia M. Close
Patricia M. Close
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Ellen Fry
Ellen Fry
Member