



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2006-012

Info-Electronics H P Systems Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Wednesday, August 2, 2006*

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IN THE MATTER OF a complaint filed by Info-Electronics H P Systems 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**

**INFO-ELECTRONICS H P SYSTEMS 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 Info-Electronics H P Systems 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 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.

Meriel V. M. Bradford

Meriel V. M. Bradford  
Presiding Member

Elaine Feldman

Elaine Feldman  
Member

Serge Fréchette

Serge Fréchette  
Member

Hélène Nadeau

Hélène Nadeau  
Secretary

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## STATEMENT OF REASONS

### COMPLAINT

1. On May 23, 2006, Info-Electronics H P Systems Inc. (IES) 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> concerning a procurement (Solicitation No. KW203-050533/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of the Environment for the provision of three complete polar orbiting satellite tracking, receiving and processing systems.

2. IES alleged that PWGSC improperly evaluated its proposal. Specifically, it made the following allegations: (1) PWGSC double-counted the costs for image processing software, which caused IES's price to increase unnecessarily; (2) the evaluators failed to take into account discounts on software licences which were offered by IES; (3) the evaluators failed to give IES sufficient technical points for small modifications to its software; and (4) PWGSC failed to ask IES for clarifications on its bid.

3. IES requested, as a remedy, that the Tribunal recommend that PWGSC terminate the contract with Seaspace Corporation Sales Department (Seaspace) and award the contract to IES. It also requested its bid preparation costs and its costs incurred in preparing and proceeding with the complaint.

4. On May 30, 2006, 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*.<sup>2</sup>

5. On May 31, 2006, PWGSC informed the Tribunal that a contract had been issued to Seaspace. On June 27, 2006, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On July 6, 2006, IES filed its 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 written information on the record.

### PROCUREMENT PROCESS

7. The Request for Proposal (RFP) was issued on January 5, 2006. The closing date for bids was February 15, 2006, at 2:00 p.m. Atlantic time. The RFP stated the following: "All the deliverables must be received by each area (Edmonton and Dartmouth) on or before 31 March 2006 and installation will be completed by end of June 2006."<sup>4</sup> Amendments were issued on January 20, 2006, to provide answers to five technical questions and on February 9, 2006, to amend the milestones regarding the method of payment.

8. This procurement falls under Goods and Services Identification Number N5820 (Radio and Television Communication Equipment, Except Airborne), which corresponds to Federal Supply Classification (FSC) Class 5820. Procurements in respect of FSC Group 58 are not covered under Annex

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

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

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

4. Article 4.1 of the RFP.

1001.2b 1(c) of the *North American Free Trade Agreement*<sup>5</sup> nor under General Note 1(c) of the *Agreement on Government Procurement*.<sup>6</sup> There is no similar exclusion under the *Agreement on Internal Trade*.<sup>7</sup> Therefore, only the *AIT* applies to this procurement.

9. Two proposals were received, one from IES and one from Seaspace. On March 2, 2006, the contract was awarded to Seaspace.

10. On April 4, 2006, when IES became aware that the contract relating to this solicitation had been awarded, it requested that PWGSC provide it with information on the evaluation of its proposal. On April 12, 2006, PWGSC sent the evaluation documents to IES. On April 27, 2006, IES filed an objection with PWGSC regarding the evaluation of its proposal. On May 2, 2006, IES received information from PWGSC regarding the detailed breakdown of its financial proposal for evaluation purposes. On May 10, 2006, PWGSC provided IES with a debriefing that addressed its objections. On May 23, 2006, IES filed its complaint with the Tribunal.

## POSITIONS OF THE PARTIES

### IES's Position

11. IES submitted that, in calculating the cost of the system that it proposed, PWGSC double-counted the costs of certain proposed software licences and did not factor in certain proposed applicable discounts. In particular, it submitted that Annex C of the RFP did not contain a "Total" line and, therefore, it could not reasonably have understood that all the listed items would simply be added together. IES also claimed that, if its bid was unclear, PWGSC should have asked it for clarification. It also submitted that its technical proposal was marked down significantly, in particular, because of the necessity to slightly customize its proposed software.

12. IES submitted that it proposed a system that is comprised of commercial off-the-shelf software (COTS) hardware and software, which has been used at several locations and by reputable organizations. IES contended that slight customization of proven software does not prevent customized software from being designated as COTS software. It argued that, unless a specification is written around a particular potential supplier's product, some measure of customization will always be necessary to meet the needs of a solicitation such as this one. Indeed, it indicated that satellite data reception systems like the one in issue are not general-use off-the-shelf products and, therefore, cannot be likened to COTS word-processing or spreadsheet software; rather, they are meant to fulfil the specific requirements of sophisticated users, such as meteorologists.

### PWGSC's Position

13. With respect to the double-counting of the cost for the image processing software, PWGSC submitted that Section II of Part 3 of the RFP required bidders to submit a financial bid in accordance with

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5. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994).

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)>.

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.intrasec.mb.ca/index\\_en/ait.htm](http://www.intrasec.mb.ca/index_en/ait.htm)> [*AIT*].

Annex C to the RFP.<sup>8</sup> PWGSC submitted that the alleged double-counting related to the licence cost that IES listed as forming part of its proposal.

14. With respect to the evaluators' failure to take into account discounts on software licences which were offered by IES, PWGSC submitted that bidders were required to quote firm unit prices and that IES should have factored in any applicable discount to reduce its prices listed in Annex C. PWGSC contended that the interpretation of Annex C, as advocated by IES, would change the fixed prices required by that annex into variable and conditional prices.

15. With respect to scoring, PWGSC submitted that IES's technical proposal was evaluated according to the evaluation criteria and specifications contained in the RFP. The GIR refutes in detail each of the allegations of improper scoring raised by IES. PWGSC submitted that the Tribunal should, as it has done in several other matters, defer to the judgment of the technical evaluators unless there is evidence of a breach of the evaluation procedures.

16. Annex A to the RFP provided that "... [t]he proposed system ... utilize proven technology and commercial off the shelf (COTS) hardware and software ...". On the meaning of the term "COTS software", PWGSC submitted that the National Aeronautics and Space Administration defines "COTS software" as excluding any customization for a particular project.<sup>9</sup> It also submitted that COTS software is consistently defined to exclude software that has been customized or altered for a particular user.<sup>10</sup> PWGSC submitted that, despite the requirement for COTS software, IES acknowledges in its complaint that certain features of its proposed software were specified as custom products. PWGSC submitted that customization of COTS software, whether "slight" or otherwise, excludes customized software from being COTS software. It also submitted that proposing a custom product that must be developed was inconsistent with the requirement for COTS software and that the evaluators agreed that no points would be awarded for proposing such software.

17. With respect to IES's allegation that PWGSC evaluated IES's bid without asking for certain clarifications, PWGSC submitted that, while it reserved the right to seek clarifications from bidders, it was not obliged to do so. PWGSC submitted that each bidder was advised that it "... must submit its Financial Bid in accordance with Annex [C] – Basis of Payment ...". It further submitted that IES submitted the following in its complaint: "... We did not present in the Table of Annex C with discount because we were not sure how Table of Annex C was going to be used ...".<sup>11</sup> PWGSC submitted that, to assist bidders to understand the requirements of the solicitation and to submit competitive proposals, the RFP provided for enquiries to the contracting authority. It further submitted that the Tribunal has held, in past decisions, that bidders bear the onus to seek clarification of matters considered ambiguous or uncertain. PWGSC therefore submitted that IES bore the onus to seek clarification of any matters in the RFP which were not entirely clear and that IES must bear the consequences of any uncertainty for which it did not seek clarification.

18. Finally, in the event that the complaint was found to be not valid, PWGSC requested its costs incurred in responding to the complaint. In the event that the complaint was found to be valid in part only, it submitted that no party should be awarded its costs.

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8. The statement in the RFP mistakenly referred to Annex B; the correct reference was to Annex C.

9. GIR, Exhibit 3.

10. GIR, Exhibit 4.

11. Complaint, Tab 1, Attachment 1 at 3.

## TRIBUNAL'S ANALYSIS

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 *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 instance, is the *AIT*.

20. In view of the facts and the issues raised in this case, the Tribunal considers that Article 506(6) of the *AIT* constitutes the relevant provision under which to conduct its analysis. This article provides 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."

### Financial Evaluation

21. The RFP required bidders to submit their bids in three separately bound sections (Technical, Financial and Certifications). The instructions read as follows:

...

It is essential that the elements contained in a bid be stated in a clear and concise manner. Failure to provide complete information as requested will be to the Bidder's disadvantage.<sup>12</sup>

...

22. More specifically with respect to the financial proposal, the RFP stated the following: "... **PRICES MUST NOT APPEAR IN ANY OTHER AREA OF THE BID EXCEPT IN THE FINANCIAL BID SECTION...**" It also stated: "... The Bidder must submit its Financial Bid in accordance with Annex [C] - Basis of Payment..." The first paragraph of Annex C to the RFP instructs bidders to quote firm unit prices and provides a list of headings under which those prices are to be quoted. In addition, bidders are instructed to list any additional charges that form part of their proposals that are not specifically identified on the previous page. Article 10 d) of Annex A repeats the required price format.

23. In previous decisions, the Tribunal has made it clear that suppliers bear the onus to respond to and meet the criteria established in a solicitation.<sup>13</sup> The Tribunal has also made it clear that the bidder bears the onus to seek clarification before submitting an offer.<sup>14</sup> It has also stated that it will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>15</sup>

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12. Complaint, Tab 3 at 6.

13. 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) [*WorkLogic*].

14. See, for example, *Re Complaint Filed by Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT).

15. See, for example, *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

24. IES submitted a completed Annex C of 2 pages and a separate financial proposal consisting of 19 pages, including 8 tables and other figures. According to the GIR, PWGSC carried out the financial evaluation of both bids on the basis of the information in each bid's respective Annex C, which was the basis for evaluation described in the RFP. Confidential exhibit 6 of the GIR shows the figures that were submitted by each bidder. The evaluators used these figures to establish the evaluation price of each of the bids. The Tribunal notes that IES's figures, taken from its Annex C, were the basis for the financial evaluation of its bid.

25. The bidder has the onus to ensure that the information submitted as part of its bid is clear.<sup>16</sup> In the Tribunal's view, the evidence suggests a difference of opinion between IES and PWGSC as to the significance of the information submitted in the proposal, rather than PWGSC's failure to conduct the evaluation in accordance with the RFP. In particular, IES is apparently asking the Tribunal to validate certain assumptions that it made regarding the financial information that was required by the RFP. In the Tribunal's view, the RFP did not allow IES to make such assumptions and, once IES had made those assumptions, IES bore the onus to verify them with the contracting authority if it wanted to base its financial proposal upon them. The ability to remedy this apparent shortcoming is not within the Tribunal's jurisdiction. Further, in the Tribunal's view, IES bore the onus to ensure that its financial information was presented in such a manner as to preclude any possible mistake in evaluating its total firm unit price. Finally, nothing in the RFP allowed IES to presume the number of licences to be purchased.

26. Accordingly, the Tribunal is of the view that the financial evaluation was carried out in conformity with the criteria and methodology set out in the RFP.

### Technical Evaluation

27. According to IES, there were several rated criteria for which it was unfairly denied points during the technical evaluation of its proposal. In its complaint, IES identifies each instance where this occurred. The evaluation criteria and points for each of the requirements were published with the RFP.<sup>17</sup>

28. The GIR provides the technical scoring sheet that shows the criteria and number of points, with explanatory comments, that the evaluators assigned to each criterion for each of the proposals submitted in response to the RFP.<sup>18</sup> In addition, it discusses each criterion and the corresponding rating assigned to IES's proposal by the evaluators.

29. With respect to the issue of COTS software and IES's allegation that PWGSC marked down its technical proposal, the Tribunal carefully considered the evidence and finds no indication that the evaluators did not assess this aspect of the technical proposal in accordance with the RFP. Indeed, IES submitted that its technical proposal had been "...marked down significantly because of the necessity of slightly customizing [its] software, despite the fact that the customized software would fully meet the customer's needs and pose no delivery or operational risk..."<sup>19</sup> The majority of the points that are in dispute relate to items required in the technical specifications for the software and processing systems, but identified by IES in its compliance table as requiring development.<sup>20</sup>

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16. See, for example, *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT); *Re Complaint filed by Empowered Networks Inc.* (27 December 2001), PR-2001-025 (CITT).

17. Complaint, Tab 3, "Evaluation Criteria" at 1, 2.

18. GIR, Confidential exhibit 5.

19. Complaint, Tab 1, Attachment 1 at 3.

20. Complaint, Confidential Tab 10.

30. According to the Tribunal, the Government was entitled to specify a COTS solution, and IES did not challenge any of the specifications, including the requirement that the proposed system utilize proven technology and COTS hardware and software, at the time when the RFP was published and when IES would first have become aware of them. Rather, IES apparently decided to bid its product, recognizing that this product would need customizing in order to meet the technical specifications of the RFP. Accordingly, the evaluators allocated reduced points for this particular aspect of IES's technical proposal.

31. Having reviewed the GIR and PWGSC's assessment of IES's technical proposal, the Tribunal finds no evidence to support IES's position that the scoring of the technical aspects of its proposal was not carried out in accordance with the evaluation criteria and procedures provided for in the RFP. PWGSC's detailed explanations provided in the GIR could not have been determined from the comments contained in the Government's evaluation documents provided to IES. However, the Tribunal finds that the more detailed explanations of the ratings provided in the GIR are consistent both with the requirement for a COTS solution and with the information given to IES. Furthermore, they address the specific provisions of the technical elements presented by IES in its proposal.

32. With respect to the allocation of points for other technical aspects of the proposal, the Tribunal has carefully considered the process followed by the evaluators and finds it to be in accordance with the stated criteria and evaluation scheme. As stated earlier, the Tribunal will not substitute its judgment for that of the evaluators unless there is a breach in the evaluation procedures. Accordingly, the Tribunal finds that there is no basis for IES's claim that PWGSC assessed its technical proposal unfairly.

### **Request for Clarification**

33. IES submitted that, if there was any doubt about how to interpret its financial proposal, PWGSC should have sought clarification prior to awarding the contract.

34. The RFP contains the following statement: "... The PWGSC evaluation team reserves the right but is not obliged to perform any of the following: (a) seek clarification or verify any or all information provided by the Bidder with respect to this Bid Solicitation . . . ." <sup>21</sup> It is well established in Tribunal jurisprudence that a procuring entity *may* seek clarification from bidders, but that it is under no obligation to do so. <sup>22</sup> The Tribunal does not find that PWGSC erred in not seeking clarification from IES with respect to its financial proposal. Indeed, if IES found that Annex C was unclear, as it alleges, then it should have submitted a question to PWGSC well in advance of bid closing in order to clarify the requirements for the format in which the financial information or basis of payment was to be submitted.

### **Conclusion**

35. In light of the foregoing, the Tribunal determines that IES's complaint is not valid.

36. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *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 complaint case has a complexity level corresponding to the second level of complexity

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21. RFP at 7.

22. See, for example, *Re Complaint Filed by IBM Canada Limited* (10 April 2003), PR-2002-040 (CITT); *WorkLogic*.

referred to in Appendix A of the *Guideline* (Level 2). The procurement was of medium complexity, as it involved the provision of off-the-shelf items and included an element of installation in multiple locations. The complaint was also of medium complexity, as it dealt with both financial and technical evaluation issues. The complaint proceedings were of low complexity and involved no motions and no interveners. 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

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

38. 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 IES. 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 in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Meriel V. M. Bradford

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Presiding Member

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