



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2008-033

MTS Allstream Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Tuesday, February 3, 2009*

*Reasons issued
Tuesday, February 24, 2009*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS 1

 PROCUREMENT PROCESS..... 1

 TRIBUNAL’S ANALYSIS..... 2

 Remedy.....6

 Costs6

DETERMINATION OF THE TRIBUNAL7

IN THE MATTER OF a complaint filed by MTS Allstream 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

MTS ALLSTREAM 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 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 compensate MTS Allstream Inc. for the profit that it would have earned had it been awarded the contract. The basis for calculating the profit will be the price contained in the proposal submitted by MTS Allstream Inc. in response to Solicitation No. M9010-091832/A for portable and mobile radios on behalf of the Royal Canadian Mounted Police.

The Canadian International Trade Tribunal recommends that MTS Allstream Inc. and the Department of Public Works and Government Services negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Canadian International Trade Tribunal on the outcome.

Should the parties be unable to agree on the amount of compensation, MTS Allstream Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of MTS Allstream Inc.'s submission to file a response. MTS Allstream Inc. will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards MTS Allstream Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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

Tribunal Member:	Serge Fréchette, Presiding Member
Director:	Randolph W. Heggart
Investigation Manager:	Michael W. Morden
Investigator:	Josée B. Leblanc
Counsel for the Tribunal:	Pinelopi Makrodimitris
Complainant:	MTS Allstream Inc.
Counsel for the Complainant:	Candace Bishoff
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	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

1. On November 6, 2008, MTS Allstream Inc. (MTS) 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 Solicitation No. M9010-091832/A, a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for portable and mobile radios.

2. MTS submitted that PWGSC initially informed it that its proposal was compliant, but that the contract had been awarded to Motorola Canada Limited (Motorola) because Motorola had submitted a lower cost proposal. According to MTS, when it informed PWGSC that it should have been awarded the contract based on the scenarios for award listed in the Request for Proposal (RFP), PWGSC re-evaluated MTS's bid and improperly declared its proposal non-compliant. MTS requested, as a remedy, that it be declared the successful bidder and be awarded the contract in question. In the alternative, MTS requested compensation for the profit that it lost in not being awarded the contract. In addition, it requested a postponement of the contract award, as well as its complaint and bid preparation costs.

3. On November 14, 2008, 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 As the evidence in the complaint indicated that the contract had already been awarded, the Tribunal did not issue a postponement of award of contract order. On December 9, 2008, PWGSC submitted the Government Institution Report (GIR). On December 19, 2008, MTS filed its comments on the GIR. On January 6, 2009, PWGSC submitted additional information regarding the re-evaluation process.

4. 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

5. The RFP, dated August 29, 2008, was made available through MERX³ on September 2, 2008. The RFP allowed bidders to submit proposals under two distinct scenarios: Scenario 1, under which the bidder would just provide the requested radios and support; and Scenario 2, under which the bidder would provide the requested radios and support and would allow the RCMP to trade in its existing radios to reduce the overall price. The bidding period closed on September 22, 2008, and two bids were received: one from MTS and one from Motorola.

6. In a letter dated October 21, 2008, PWGSC advised MTS that, although its proposal was compliant with the mandatory requirements of the solicitation, its proposal had not provided the lowest responsive price, as determined by the evaluation process described in Part 4 of the RFP. As a result, the contract was awarded to Motorola.

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

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

3. Canada's electronic tendering service.

7. On October 22, 2008, MTS sent an e-mail to PWGSC asking whether the winning proposal was based on Scenario 1 or Scenario 2. On October 23, 2008, PWGSC advised MTS that the winning proposal was based on Scenario 2 (i.e. the trade-in option). On October 23, 2008, in an e-mail to PWGSC, MTS noted that the difference between its price under Scenario 1 and the winning bidder's price under Scenario 2 was not larger than the minimum difference required by the RFP. As a result, MTS asked for clarification regarding PWGSC's basis for not selecting MTS's valid Scenario 1 proposal.

8. In a letter dated October 30, 2008, PWGSC informed MTS that it had erroneously advised MTS on October 21, 2008, that its proposal was compliant. PWGSC advised MTS that, in fact, MTS had not properly supported its claims of compliance, as required by paragraph 1.1.1(b) of Part 4 of the RFP.

9. On November 3, 2008, MTS sent an e-mail to PWGSC objecting to the characterization of its bid as non-compliant.

10. On November 4, 2008, a conference call took place between MTS and PWGSC in an attempt to resolve the matter. During that call, PWGSC advised MTS that it would take no further action and that the decision to award the contract to Motorola was final.

11. On November 4, 2008, MTS filed its initial submission regarding the solicitation with the Tribunal. On November 5, 2008, the Tribunal acknowledged receipt of the submission and advised MTS that additional information had to be provided before the Tribunal would consider the complaint properly documented.

12. On November 6, 2008, MTS provided the Tribunal with that additional information.

TRIBUNAL'S ANALYSIS

13. 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 the validity of the complaint 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

14. Article 506(6) of the *AIT* provides that "... 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."

15. The Tribunal finds that the RFP was very clear in identifying the specific goods that could be proposed by bidders.

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

16. Paragraph 2(i) of Part 1 of the RFP provided as follows:

2. Summary

- (i) The Contractor *must provide* 243 Motorola XTS5000 Model 3 Portable Radios 800 MHz and 32 Motorola XTL5000 Dash Mount Mobile Radios 800MHz as per Annex “B” - Basis of Payment and in accordance with the requirement at Annex “A” - Statement of Work (SOW).

Or,

The Contractor *must provide* 243 Motorola XTS5000 Model 3 Portable Radios 800MHz with the trade-in of 243 Motorola XTS3000 Model 3 Portable Radios 800 MHz and 32 Motorola Dash Mount Mobile Radio 800 MHz (no trade-in for the mobile radios) as per Annex “B” - Basis of Payment and in accordance with the Requirement at Annex “A” - Statement of Work (SOW).

[Emphasis added]

17. At the end of section 1.1.2 of Part 4 of the RFP, the following statement was included: “Any bid which fails to meet the following Mandatory Technical Criteria will be deemed non-responsive and will not be given further consideration . . .” Part 4 of the RFP established the evaluation procedures that would be used to select the winning proposal. Section 1.1.3 of Part 4 then listed 16 mandatory technical criteria for the portable radios and 17 mandatory technical criteria for the mobile radios. All these criteria were very specific in nature and were worded in such a way that a bidder could either meet or not meet the criteria. Two examples of the mandatory technical criteria required by the RFP are provided below.

(A) PORTABLE RADIO MANDATORY TECHNICAL CRITERIA

	Criteria	Met	Not Met
MT.A1	The portable radio must be a Motorola XTS5000 Model 3, 800MHz (764-870MHz) portable radio.		

(B) MOBILE RADIO MANDATORY TECHNICAL CRITERIA

	Criteria	Met	Not Met
MT.B1	The mobile radio must be a Motorola XTL5000 10-35 Watts, (764-870MHz), portable radio.		

18. In addition, the Tribunal notes that clause B4024T (2006-08-15) of the Standard Acquisition Clauses and Conditions entitled “No Substitute Products” was incorporated into the RFP by reference. This clause provided as follows:

Bidders must provide products that are of the same description, brand name, model and/or part number as detailed in the item description of the bid solicitation. Bidders are advised that substitute products will not be considered.

19. Given the terms of the RFP, it is clear to the Tribunal that bidders were required to submit proposals for “243 Motorola XTS5000 Model 3 Portable Radios 800 MHz” and “32 Motorola XTL5000 Dash Mount Mobile Radios 800MHz”. The frequent use of the word “must” in all of the above RFP clauses makes it clear that any proposal offering substitute products would be deemed non-compliant.

20. Part 3 of the RFP also provided the following bid preparation instructions:

Section I: Technical Bid

In their technical bid, bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements. Bidders should demonstrate their capability and describe their approach in a thorough, concise and clear manner for carrying out the work.

The technical bid should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the bid will be evaluated. Simply repeating the statement contained in the bid solicitation is not sufficient

21. Part 4 of the RFP also provided the following instructions:

. . .

1.1 Technical Evaluation

It is recommended that the Bidders include a compliance checklist in their proposals, cross-referring each mandatory technical criteria with the relevant portion in their proposals.

1.1.1 In order to establish full and unreserved compliance with all mandatory provisions, the bidder **must**:

- (a) specify that its Proposal is COMPLIANT or NON-COMPLIANT to those paragraphs/requirements which are associated with the bolded word “**must**” which are mandatory/essential requirements. The bidder can describe its compliance to these paragraphs/requirements by using the word “COMPLIANT” or the word “NON-COMPLIANT”;
- (b) clearly demonstrate compliance to mandatory/essential requirements by providing a statement which clearly supports/justifies the response provided;
and/or
Clearly demonstrate compliance to mandatory/essential requirements by providing features or characteristics with Original Equipment Manufacturer (OEM) or vendor published specifications, manuals, brochures or test data. This documentation **must** be included with the proposal;
- (c) include clear directions regarding where the relevant information required for evaluation can be found in its proposal. References to Web pages are forbidden. The bidder’s proposal must be complete by itself.

1.1.2 The aforementioned compliance terms in paragraph 1.1.1 (a) have the following meanings:

- 1) COMPLIANT indicates that the Bidder claims total satisfaction of, or total agreement with, or total acceptance of all elements of the stated requirement or condition.
- 2) NON-COMPLIANT indicates that the Bidder cannot claim total satisfaction of, or total agreement with, or total acceptance of all elements of the stated requirement or condition.

. . .

2. Basis of Selection

- 2.1 A bid must comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive.

- 2.2 The Crown will identify the lowest valid Scenario 1 bid price and the lowest valid Scenario 2 bid price from among all compliant bidders. If the lowest valid Scenario 2 bid price is at least \$97,200.00 less than the lowest valid Scenario 1 bid price, the bid with the lowest valid Scenario 2 bid price will be recommended for award of a contract, otherwise the bid with the lowest valid Scenario 1 bid price will be recommended for award of a contract. In the event that there are no valid Scenario 2 bid prices the bid with the lowest valid Scenario 1 bid price will be recommended for award of a contract. In the event there are no valid Scenario 1 bid prices no contract will be awarded.

22. Based on the evidence on the record, the Tribunal is of the view that there was only one reasonable interpretation of the proposal submitted by MTS. The Tribunal finds that, in its proposal, MTS was offering PWGSC the exact products being requested and that, by submitting its proposal, committed itself to providing those specific products.

23. PWGSC submitted that paragraph 1.1.1(a) of Part 4 of the RFP required bidders to “specify” compliance with each mandatory requirement (e.g. use the word “COMPLIANT” or “NON-COMPLIANT” in each case). In addition, PWGSC submitted that paragraph 1.1.1(b) required bidders to “clearly demonstrate” such compliance by providing supporting statements or documentation. The Tribunal fails to see how the requirement to clearly demonstrate compliance would add any value in terms of an additional meaning to a proposal where a supplier commits to providing exactly the product being requested. In this case, requiring supporting statements or documentation not only is redundant but also demands an unreasonable adherence to form over substance. In this regard, the Tribunal finds revealing that, on September 29, 2008, during the initial evaluation phase, the RCMP evaluators advised PWGSC that they would be treating MTS’s bid submission as compliant.

24. Furthermore, the Tribunal notes that an ambiguity exists in section 1.1.1 of Part 4 of the RFP. A close review of that provision reveals the absence of a conjunction between paragraphs (b) and (c). The absence of the word “and” or “or” at the end of paragraph (b) leaves this section open to more than one reasonable interpretation. One interpretation would be to read in the word “and” between paragraphs (b) and (c). Doing so would make the requirements of all three paragraphs mandatory. On the other hand, if one read in the word “or” between paragraphs (b) and (c), then it would be reasonable to infer that only one of the three requirements needs to be met. Applying the principle of *contra proferentem* to this matter, any ambiguities should be construed as against the party that drafted the ambiguous provision. In this case, that party is PWGSC.

25. Accordingly, based on the definition of the word “compliant” in the RFP, as set forth in section 1.1.2 of Part 4, the Tribunal agrees with MTS’s submission that its response of “compliant” to each mandatory technical criteria established “total satisfaction of, or total agreement with, or total acceptance of all elements of the stated requirement or condition.” In other words, by responding to each mandatory technical criterion with the word “compliant”, MTS satisfied the requirement imposed on bidders by section 1.1.1 of Part 4.

26. The Tribunal does not generally 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 proposal, 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.⁵ The Tribunal is of the opinion that, in this case, the interpretation and application of the applicable requirements

5. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT).

are unreasonable and unfair. The Tribunal concludes that PWGSC violated Article 506(6) of the *AIT* by not properly applying the evaluation criteria and, consequently, inappropriately declaring MTS's bid non-compliant.

27. In light of the foregoing, the Tribunal determines that MTS's complaint is valid.

Remedy

28. Having found the complaint to be valid, the Tribunal must now consider a suitable means of redressing the harm caused as a result of the deficiencies in the procurement process.

29. In this regard, subsection 30.15(3) of the *CITT Act* reads as follows:

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

30. The Tribunal believes that, but for PWGSC's actions, MTS would have been awarded the contract based on its proposal under Scenario 1, since Motorola's proposal under Scenario 2 did not meet or exceed the minimum price difference required by the RFP. While there is no evidence that PWGSC or the RCMP was acting in bad faith, PWGSC's actions resulted in the exact opposite result for which this particular solicitation, and the procurement process in general, strives, i.e. awarding the contract to the bidder whose proposal best addresses the requirements enunciated in the RFP. Accordingly, the Tribunal finds that PWGSC's actions prejudiced the integrity and efficiency of the competitive procurement process. Given that the contract was awarded in October 2008 and required that all deliverables be received on or before March 31, 2009, the Tribunal does not want to disrupt the operations of the RCMP by recommending the cancellation of the existing contract at this late stage.

31. In view of the above, the Tribunal recommends that PWGSC compensate MTS for the profit that it would have earned had it been awarded the contract. That compensation shall be based on the proposal submitted by MTS in response to Solicitation No. M9010-091832/A.

Costs

32. The Tribunal awards MTS its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it was for slightly complex off-the-shelf items that included an element of maintenance servicing while under the five-year warranty

period. The complexity of the complaint was low, in that the ground of complaint involved a single criterion. Finally, the complexity of the complaint proceedings was low, as there were no motions or interveners, a public hearing was not required, the 90-day time frame was respected, and the parties did not file information beyond the normal scope of proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

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

34. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate MTS for the profit that it would have earned had it been awarded the contract. The basis for calculating the profit will be the price contained in the proposal submitted by MTS in response to Solicitation No. M9010-091832/A for portable and mobile radios on behalf of the RCMP.

35. The Tribunal recommends that MTS and PWGSC negotiate the amount of compensation and, within 30 days of the date of this determination, report back to the Tribunal on the outcome.

36. Should the parties be unable to agree on the amount of compensation, MTS shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of MTS's submission to file a response. MTS will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments.

37. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards MTS its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. 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 reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member