



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-047

L-3 Communications MAPPS Inc.

*Decision made  
Wednesday, February 4, 2009*

*Decision and reasons issued  
Wednesday, February 11, 2009*

IN THE MATTER OF a complaint filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

**BY**

**L-3 COMMUNICATIONS MAPPS INC.**

**AGAINST**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**DECISION**

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Moreover, subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint in issue relates to a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the in-service support of its Victoria Class submarine trainers. In regard to Solicitation No. W8482-084088/A, L-3 Communications MAPPS Inc. (L-3), of Saint-Laurent, Quebec, alleged that PWGSC improperly awarded the contract to a bidder that had submitted a non-compliant proposal.

3. The solicitation required, among other things, that potential bidders establish agreements with four specified original equipment manufacturers (OEMs), or provide letters from these OEMs confirming that agreements would be put in place upon contract award, to ensure access to necessary technical support and/or intellectual property rights required to perform duties under the contract. In its complaint, L-3 claimed that the winning bidder, MacDonald, Dettwiler and Associates Ltd. (MDA), failed to meet this mandatory requirement, as it had not secured the necessary licensing from Thales Training and Simulation Limited (Thales), one of the listed OEMs.

4. The date for the receipt of bids was October 22, 2008. L-3 and at least one other bidder, MDA, submitted proposals. On November 21, 2008, prior to the completion of the evaluation of proposals by PWGSC, Thales, the OEM for the ship control trainer (SCT) and machinery control trainer (MCT), which formed part of the required in-service support, sent a letter to PWGSC advising PWGSC that MDA had not obtained the necessary intellectual property and data rights and could not do so because Thales had already granted an exclusive licence to L-3. By letter dated December 12, 2008, PWGSC advised L-3 that a contract had been awarded to MDA. On December 23, 2008, L-3 wrote to PWGSC asking, among other things, how PWGSC had determined that MDA's bid met the mandatory criteria regarding the establishment of agreements with the listed OEMs. L-3 prefaced its questions by stating that it believed that MDA could not comply with the requirements of the solicitation, given the existence of an exclusive licence agreement between L-3 and Thales. In this regard, L-3 also made reference to the November 21, 2008, letter from Thales to PWGSC, a copy of which had been provided to L-3, advising PWGSC of the exclusive licence. In its January 5, 2009, letter of reply to L-3, PWGSC stated that the evaluation team had deemed that MDA's proposal met the mandatory requirements set forth in the Request for Proposal (RFP).

5. On January 16, 2009, PWGSC held a debriefing session with L-3 at which, according to L-3, PWGSC confirmed the contents of its January 5, 2009, letter without adding any additional information regarding the evaluation of MDA's proposal. On January 20, 2009, L-3 held a conference call with MDA regarding the licensing of intellectual property and data rights associated with the SCT and MCT. At that time, MDA provided L-3 with a copy of a letter that Thales had sent to MDA during the solicitation period. According to L-3, MDA included that letter with its proposal in purported compliance with the requirement for confirmation of access to necessary technical support and/or intellectual property rights required to perform the duties under the contract through agreements with or letters from stipulated OEMs.

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

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

6. On January 29, 2009, L-3 filed its complaint with the Tribunal.

7. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "... not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier." Subsection 6(2) provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal "... within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

8. In other words, a complainant has 10 working days from the date on which it first becomes aware or reasonably should have become aware of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

9. Section 17.15 of Annex B of the RFP reads as follows:

...

The Contractor shall establish, and maintain for the duration of this Contract, Licensing Agreements, Non-Disclosure Agreements (NDAs) and/or Collaborative Arrangements with the following OEMs (or the OEM's agents) for access to necessary technical support and/or OEM-owned Intellectual Property required in order to successfully perform duties under this Contract:

...

b. Thales Training and Simulation Limited for the SCT and MCT;

...

10. Mandatory requirement A3.6 of the bid evaluation plan found in Appendix A to Annex D of the RFP reads as follows:

Bidder shall provide all necessary Licensing Agreements, NDAs and/or Collaboration Agreements with stipulated OEMs, or letters from stipulated OEMs confirming that such agreements will be put in place upon Contract award.

11. Based on the evidence submitted in the complaint, the Tribunal is of the view that the basis of the complaint became known or reasonably should have become known to L-3 on December 12, 2008, when it was first advised by letter from PWGSC that the contract had been awarded to MDA. In this regard, L-3 knew that it was a mandatory requirement of the RFP that bidders have an agreement, or a letter confirming that an agreement would be put in place, with four specified OEMs, including Thales, to ensure access to necessary technical support and/or intellectual property rights. Indeed, L-3 indicated that "[t]he core duties to be performed under the contract in regard to the SCT and MCT... require access to the Thales intellectual property licence to L-3..."<sup>3</sup> Therefore, given L-3's exclusive licence agreement with Thales and its knowledge of the November 21, 2008, letter from Thales to PWGSC, in which the latter was advised by the former that MDA had not obtained, and indeed could not obtain, the necessary intellectual property and data rights from it, the Tribunal can only conclude that L-3 knew or reasonably should have known of its ground of complaint on December 12, 2008.

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3. Complaint, para. 33.

12. In its complaint, L-3 argued that it was not until January 20, 2009, when it obtained from MDA a copy of Thales' letter that had been included in MDA's proposal, that it was able to confirm that MDA did not satisfy mandatory requirement A3.6. L-3 argued that, up until receiving confirmation from MDA that it did not have a licence for the requisite Thales intellectual property, L-3 had considered that MDA had possibly obtained such rights from another source, such as DND.

13. The Tribunal considers this argument to be without merit. The RFP clearly required bidders to "... establish... Licensing Agreements... with the following OEMs... b. Thales Training and Simulation Limited for the SCT and MCT..." The Tribunal understands this to mean that only Thales, and not any other party such as DND, could provide the necessary licence regarding the SCT and MCT. As indicated above, L-3 was provided with a copy of Thales' letter of November 21, 2008, in which Thales advised PWGSC that MDA could not obtain the necessary intellectual property and data rights because of the exclusive licence agreement between Thales and L-3. In the Tribunal's view, the language of the RFP, the exclusive nature of the licence agreement between Thales and L-3, and the November 21, 2008, letter from Thales to PWGSC obviated the need for L-3 to obtain further confirmation that MDA's bid did not satisfy mandatory requirement A3.6. As such, the Tribunal is of the opinion that L-3 knew, or reasonably should have known, the basis of its complaint on December 12, 2008, when PWGSC advised it by letter that MDA had been awarded the contract.<sup>4</sup>

14. The Tribunal considers L-3's letter of December 23, 2008, in which it questioned the manner in which the contract was awarded, to be an objection made in accordance with subsection 6(2) of the *Regulations*. The Tribunal also considers that L-3 received its denial of relief when PWGSC responded to that letter, on January 5, 2009, and informed L-3 that MDA's proposal had met the mandatory requirements of the RFP. L-3, therefore, had 10 working days from January 5, 2009, or until January 19, 2009, to file its complaint with the Tribunal. As the complaint was not filed until January 29, 2009, the Tribunal considers it to have been filed outside the prescribed time frame.

15. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

## DECISION

16. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

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4. As stated by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.*, 2002 FCA 284 (Can LII), "... [i]n procurement matters, time is of the essence. ... [Potential suppliers] are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. ..."