



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-051

Hatehof Ltd.

*Decision made
Monday, August 23, 2010*

*Decision and reasons issued
Tuesday, September 14, 2010*

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

BY

HATEHOF LTD.

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.

André F. Scott

André F. Scott
Presiding Member

Dominique Laporte

Dominique Laporte
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² 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. 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 relates to a solicitation of interest and qualification (SOIQ) (Solicitation No. W847L-100018/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the provision of a fleet of tactical armoured patrol vehicles (TAPVs) and logistics support for the life expectancy of the TAPVs. According to the solicitation documents, the SOIQ constitutes the first phase of a two-phase procurement process. Only those respondents who meet the mandatory requirements of the selected vehicle system requirements specification (VSRS) contained in Annex C to the SOIQ will be invited to respond to a request for proposal, which constitutes the second phase of the procurement process.

3. Hatehof Ltd. (Hatehof) alleged that the wording used to describe two of the mandatory requirements of the VSRS was unclear and confusing, which unfairly discriminated against it and had the effect of creating unnecessary obstacles to international trade. Hatehof further alleged that the information it submitted in response to these two mandatory requirements clearly demonstrated that it possessed the technical capability to fulfill the contract and that PWGSC's decision to exclude it from the second phase of the procurement process because it failed to provide information in a specific form does not constitute a legitimate use of the pre-qualification process.

4. On March 24, 2010, PWGSC issued an SOIQ for the procurement of 500 TAPVs (i.e. wheeled combat vehicles), including an option to purchase up to 100 additional TAPVs, and the provision of logistics support for the life expectancy of the TAPVs. At the time the SOIQ was issued, the two mandatory requirements of the VSRS, contained in Annex C to the SOIQ, that are relevant to this complaint provided as follows:

ID	Vehicle System Requirements Specification	Type of Requirement	Instructions To Respondent
SOIQ-VSRS 116	At time of SOIQ closing, the TAPV under wheel mine protection shall provide protection to its occupants against a NATO level 3A mine blast IAW [in accordance with] <i>STANAG</i> 4569 Annex B, when tested IAW AEP-55 vol 2 Edition 1.	Mandatory	Respondents shall provide documentation/data (including the inertial matrix of the vehicle) to demonstrate their vehicle's compliance with this requirement at the time of SOIQ closing. Respondents shall clearly explain how the protection level has been qualified, stating the test standard and methodology

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

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

ID	Vehicle System Requirements Specification	Type of Requirement	Instructions To Respondent
			employed. Respondents should provide the location of the test site and a test report containing independent test results using methods found in AEP-55 vol 2 Edition 1 and reported IAW its Annex F, demonstrating compliance to at least STANAG 4569 Level 3A.
SOIQ-VSRS 117	At time of SOIQ closing, the TAPV underbelly mine protection shall provide protection to its occupants against a NATO level 2B mine blast IAW <i>STANAG</i> 4569 Annex B, when tested IAW AEP-55 vol 2 Edition 1.	Mandatory	Respondents shall provide documentation/data (including the inertial matrix of the vehicle) to demonstrate their vehicle's compliance with this requirement at the time of SOIQ closing. Respondents must clearly explain how the protection level has been qualified, stating the test standard and methodology employed. Respondents should provide the location of the test site and a test report containing independent test results using methods found in AEP-55 vol 2 Edition 1 and reported IAW its Annex F, demonstrating compliance to at least STANAG 4569 Level 2B.

5. On May 17, 2010, the "Instructions to Respondent" for SOIQ-VSRS 116 were amended as follows:

Respondents shall provide the inertial matrix of the vehicle. Respondents shall clearly explain how the protection level has been qualified, stating the test standard and methodology employed. Respondents should provide the location of the test site and a test report containing independent test results using methods found in AEP-55 vol 2 Edition 1 and reported IAW its Annex F, demonstrating compliance to at least STANAG 4569 Level 3A. **In the event that respondents are unable to provide actual test reports at the time of SOIQ closing, the submission of Annex H – Certificate of Compliance shall signify compliance with this requirement for SOIQ purposes. This does not alleviate the requirement for respondents to provide the inertial matrix of the vehicle and to clearly explain how the protection level has been qualified, stating the test standard and methodology employed.**

6. On May 17, 2010, the "Instructions to Respondent" for SOIQ-VSRS 117 were amended as follows:

Respondents shall provide the inertial matrix of the vehicle. Respondents shall clearly explain how the protection level has been qualified, stating the test standard and methodology employed. Respondents should provide the location of the test site and a test report containing independent test results using methods found in AEP-55 vol 2 Edition 1 and reported IAW its Annex F,

demonstrating compliance to at least STANAG 4569 Level 2B. **In the event that respondents are unable to provide actual test reports at the time of SOIQ closing, the submission of Annex H – Certificate of Compliance shall signify compliance with this requirement for SOIQ purposes. This does not alleviate the requirement for respondents to provide the inertial matrix of the vehicle and to clearly explain how the protection level has been qualified, stating the test standard and methodology employed.**

7. The deadline to respond to the SOIQ was originally May 26, 2010. However, as a result of amendments to the SOIQ, the deadline was extended to June 2, 2010. Hatehof submitted a response by that date, but was informed by PWGSC on July 19, 2010, that it had not qualified under the TAPV SOIQ, as its response did not comply with all the mandatory requirements of the SOIQ. PWGSC specifically referred to Hatehof's submissions in response to SOIQ-VSRS 116 and 117 as not meeting the requirements because Hatehof "... did not provide the inertial matrix of the vehicle."³

8. In a letter to PWGSC dated July 30, 2010, Hatehof objected to its exclusion from the second phase of the procurement process, stating that the wording of SOIQ-VSRS 116 and 117 was unclear. On August 4, 2010, a debriefing session was held between PWGSC and Hatehof, at which time PWGSC confirmed its position with respect to the assessment of Hatehof's response to the SOIQ. According to the complaint, Hatehof was informed by e-mail, after the debriefing, that PWGSC would not act on its letter of objection. On August 17, 2010, Hatehof filed its complaint with the Tribunal.

9. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*⁴, Chapter Five of the *Agreement on Internal Trade*⁵, the *Agreement on Government Procurement*⁶, Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁷ or Chapter Fourteen of the *Canada-Peru Free Trade Agreement*⁸ applies. In this case, only the *AGP* applies.⁹

3. Complaint at tab 4. Amendment 009 to the SOIQ provides as follows: "The inertial matrix (tensor) refers to the Moments of Inertia of the vehicle in the three dimensional primary and secondary axis, measured at Gross Vehicle Weight (GVW). The Moments of Inertia about the vehicle centre of gravity are Ixx, Iyy, Izz, Ixy, Ixz, Iyz expressed in units of kg·m² or equivalent units."

4. *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) [*NAFTA*].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

7. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

8. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

9. As Hatehof is an Israeli-based company and does not have a place of business in Canada, it cannot avail itself of the benefits of the provisions of *NAFTA*, the *AIT*, the *CCFTA* and the *CPFTA*. With respect to the applicability of the *AIT*, the Tribunal notes that, in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII), the Supreme Court of Canada held that non-Canadian suppliers do not have standing before the Tribunal to bring complaints under the *AIT*. With respect to the applicability of the *AGP*, the Tribunal notes that, while Annex 1 to Appendix I of the *AGP* specifically excludes from coverage tracked combat, assault and tactical vehicles (Federal Supply Classification code 2350) when purchased by DND, it does not exclude wheeled combat, assault and tactical vehicles (Federal Supply Classification code 2355).

10. Article VI(1) of the *AGP* provides as follows:

Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

11. Article VII(1) of the *AGP* provides as follows:

Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner

12. Article VIII of the *AGP* provides as follows:

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualifications procedures shall be consistent with the following:

. . .

(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfill the contract in question. . . .

13. Hatehof submitted that SOIQ-VSRS 116 and 117, in both their original and amended versions, were drafted in such a manner that comprehension was problematic. It submitted that the usage of brackets in the original version and the unclear drafting in the amended version meant that the requirement could easily be interpreted to mean that the inertial matrix was not required. It noted that the independent testing company that it hired to perform actual blast tests to provide the data requested in SOIQ-VSRS 116 and 117 was also of the opinion and understanding that an inertial matrix was not required. In its view, this ambiguity had the effect of creating unnecessary obstacles to international trade and resulted in Hatehof being unfairly discriminated against and disadvantaged.

14. The Tribunal is of the view that the wording of both the original and amended versions of SOIQ-VSRS 116 and 117 was clear. Both versions unambiguously and unequivocally required that an inertial matrix of the vehicle be provided at the time of SOIQ closing. The Tribunal can find no support for the proposition that the amended versions of SOIQ-VSRS 116 and 117 could reasonably be interpreted to mean that the inertial matrix could be submitted following the SOIQ provided other criteria were met. In fact, the amended versions of SOIQ-VSRS 116 and 117 clearly indicate (in bold lettering) that “[r]espondents shall provide the inertial matrix of the vehicle” and that the submission of a certificate of compliance in lieu of actual test reports “. . . does not alleviate the requirement for respondents to provide the inertial matrix of the vehicle”

15. In previous decisions, the Tribunal has made it clear that bidders bear the onus to seek clarification before submitting an offer.¹⁰ Consequently, if Hatehof believed that SOIQ-VSRS 116 and 117 were drafted such that the requirements were ambiguous, it should have sought clarification from PWGSC before it submitted a response to the SOIQ.

10. 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).

16. Hatehof, by its own admission, did not provide the inertial matrix of its proposed vehicle. The Tribunal is of the view that the SOIQ is clear in respect of the consequences of not meeting a mandatory requirement.

17. Part 4 of the SOIQ, which is entitled “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, states the following:

- 1.4 Respondents must comply with every mandatory requirement of this solicitation. In the event a respondent fails to comply with any mandatory requirement of this solicitation, its response will be deemed to be non-compliant or non-responsive and will not be given any further consideration.
- ...
- 2.1 A response must comply with the requirements of the solicitation and meet all mandatory technical evaluation criteria to be declared responsive. . . .
- 2.2 . . . All unsuccessful SOIQ respondents will be eliminated from the process and will be so advised. Unsuccessful SOIQ respondents will not be given another opportunity to pre-qualify.

18. The Tribunal is therefore of the opinion that PWGSC was justified in its decision to exclude Hatehof from the second phase of the procurement process for failure to provide an inertial matrix of its proposed vehicle at the time of SOIQ closing. Accordingly, the Tribunal finds that the complaint, on this ground, does not disclose a reasonable indication that the procurement was not conducted in accordance with the *AGP*.

19. Hatehof also argued that PWGSC’s decision to exclude it from the second phase of the procurement process because it failed to provide an inertial matrix does not constitute a legitimate use of the pre-qualification process. In its view, the requirement to provide information in a specific form is unrelated to a respondent’s capability to fulfill the contract. It submitted that the inertial matrix was required in order to demonstrate that the vehicle complies with certain mine blast protection levels and that the documentation it provided in response to the SOIQ demonstrated that it complied with these levels.

20. 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.”

21. These provisions make it clear that 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.

22. Given the Tribunal’s finding that both the original and amended versions of SOIQ-VSRS 116 and 117 unambiguously and unequivocally required that an inertial matrix of the vehicle be provided at the time of SOIQ closing, the Tribunal considers that Hatehof reasonably should have known the basis of its complaint on this ground once it reviewed the SOIQ or, at the latest, on June 2, 2010, when it submitted its response. Therefore, if Hatehof had a problem with the requirement to provide an inertial matrix, i.e. a

specific form of information, it should have objected to PWGSC regarding the inclusion of this requirement in the SOIQ or filed a complaint with the Tribunal on or before June 16, 2010 (i.e. 10 working days after June 2, 2010). As Hatehof did not object to PWGSC until July 30, 2010, and filed its complaint with the Tribunal on August 17, 2010, the Tribunal considers that the complaint, on this ground, has not been filed in a timely manner.

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

DECISION

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

André F. Scott
André F. Scott
Presiding Member