



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DECISION AND REASONS

File No. PR-2010-023

Navistar Defence Canada, Inc.

*Decision made  
Monday, August 9, 2010*

*Decision and reasons issued  
Wednesday, September 8, 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**

**NAVISTAR DEFENCE CANADA, 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.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Dominique Laporte  
Dominique Laporte  
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. 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 Tribunal is satisfied that the procurement process in question relates to a designated contract for the purposes of the *CITT Act*. Section 30.1 of the *CITT Act* and subsection 3(1) of the *Regulations* define “designated contract” as any contract concerning a procurement, as described in various trade agreements, by a government institution.

3. The complaint relates to a solicitation of interest and qualification (SOIQ) (Solicitation No. W847L-100018/A) for the procurement of Tactical Armoured Patrol Vehicles (TAPV) with an estimated value of \$300 million. These goods, having regard to the procurement value, are at a minimum covered by Chapter Five of the *Agreement on Internal Trade*.<sup>3</sup> The procuring entity that conducted the procurement on behalf of the Department of National Defence (DND) was PWGSC, which is designated as a “government institution” in paragraph 3(2)(c) of the *Regulations*.

4. Navistar Defence Canada, Inc. (Navistar) alleges that PWGSC has improperly declared its response to the SOIQ non-compliant in regards to three mandatory criteria, and therefore Navistar is not pre-qualified for the pending follow-up Request for Proposal (RFP).

---

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

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

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*]. The Tribunal notes that in the SOIQ, the Department of Public Works and Government Services (PWGSC) indicated that only the *AIT* applied to this procurement. In its complaint, Navistar indicated that the goods at issue were listed under Federal Supply Classification code 2355, *wheeled* combat, assault and tactical vehicles. It submitted that Annex 1001.1b-1 of the *North American Free Trade Agreement (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]*) provides a list of goods in Section B that are covered by Chapter Five of the *AIT*, including “[m]otor vehicles, trailers and cycles . . . except military trucks and trailers in 2320 and 2330 and tracked combat, assault and tactical vehicles in 2350” [emphasis added]. Navistar submitted that there is no exception provided in *NAFTA* for the goods at issue and therefore, in accordance with Annex 1001.1b-1, the SOIQ is subject to Chapter Ten of *NAFTA*. The *Agreement on Government Procurement*, the *Canada-Peru Free Trade Agreement* and the *Canada-Chile Free Trade Agreement* contain similar provisions. The Tribunal is of the view that it is unnecessary to make a decision regarding which of the trade agreements apply to this procurement because its decision in this case would be the same no matter which of the trade agreements applied.

5. The mandatory criteria in issue are the following Vehicle System Requirement Specifications (VSRS) found in Annex C of the SOIQ:

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	[As amended by Amendment No. 007] <b>Respondents shall provide the inertial matrix of the vehicle.</b> 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. <b>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.</b>
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	[As amended by Amendment No. 007] <b>Respondents shall provide the inertial matrix of the vehicle.</b> Respondents shall clearly explain how the protection level has been qualified, stating the test

ID	Vehicle System Requirements Specification	Type of Requirement	Instructions To Respondent
			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. <b>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.</b>
SOIQ-VSRS 389	The TAPV, with <i>STANAG</i> 4569 protection levels at 4A/3B mine blast and Ballistic level 3, shall have a minimum available <i>payload</i> of 2,000 kg.	Mandatory	Respondents shall provide documentation/data to demonstrate their vehicle's compliance with this requirement at the time of SOIQ. This documentation/data could be in the form of modelling, analysis, or actual test results.

6. The SOIQ included a document called “Annex H Certificate of Compliance” requiring bidders to certify, among other things, that they were “. . . compliant with all the articles, clauses, terms and conditions contained in the SOIQ document and satisfie[d] and incorporate[d] . . . the following: i.) All of the requirements of the above referenced SOIQ . . . .”

7. This document is particularly referenced in SOIQ-VSRS 116 and SOIQ-VSRS 117.

8. The SOIQ was issued on March 25, 2010, and Amendment No. 007 mentioned in SOIQ-VSRS 116 and 117 was issued on May 17, 2010. The deadline to respond to the SOIQ was June 2, 2010. Navistar submitted a response by this date, but learned on July 19, 2010, that its response did not meet all the mandatory requirements of the SOIQ required to pre-qualify for the RFP. PWGSC specifically referred to Navistar's submissions in relation to SOIQ-VSRS 116, 117 and 389.

9. That same day, Navistar asked PWGSC for a debriefing for the purposes of objecting to its disqualification from the solicitation process. A debriefing was held on July 28, 2010, where PWGSC confirmed its position. On August 3, 2010, Navistar filed its complaint with the Tribunal.

10. PWGSC indicated that Navistar's submission in response to the SOIQ did not meet specifications SOIQ-VSRS 116 and 117 because Navistar ". . . did not provide the inertial matrix of the vehicle."<sup>4</sup>

11. PWGSC also indicated that Navistar's submission in response to the SOIQ did not meet specification SOIQ-VSRS 389 because Navistar ". . . did not provide any supporting documentation or data to demonstrate compliance with this requirement."<sup>5</sup>

### SOIQ-VSRS 116 AND 117

12. With respect to SOIQ-VSRS 116 and 117, Navistar admits that it did not provide the inertial matrix, but contends that it was not necessary to do so at this juncture as (i) Amendment No. 007 is silent on when the matrix is required; (ii) it was not technically possible to provide the matrix before the deadline because further specifications and information on the vehicle would need to be provided by PWGSC upon issuance of the RFP; (iii) by completing Annex H Navistar signified its ability to fully comply with the requirements; (iv) the wording of the SOIQ is ambiguous; and (v) Navistar reasonably interpreted and responded to these requirements.<sup>6</sup>

13. In its complaint, Navistar submits that "[i]t is incoherent, unnecessary, and confusing for PWGSC to ask bidders to certify compliance with all [mandatory requirements] in the form of Annex H, and then seek "additional" proof of compliance for certain [mandatory requirements]."

14. The Tribunal is of the view that the wording of SOIQ-VSRS 116 and 117, as modified by Amendment No. 007, is clear.

15. A simple reading of SOIQ-VSRS 116 and 117 will immediately reveal that, notwithstanding the Annex H component, Navistar needed to minimally (a) supply the inertial matrix of the vehicle, (b) explain how the protection level was qualified, stating the test standard and methodology employed, and (c) supply the location of the test site. It appears that Annex H only applied to the test reports themselves.

16. The Tribunal cannot ignore the following requirement of SOIQ-VSRS 116 and 117, which appears in bold lettering and makes this requirement very clear, notwithstanding Annex H:

Respondents *shall* provide the inertial matrix of the vehicle. . . . 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.

[Emphasis added]

---

4. Confidential complaint at para. 25.

5. *Ibid.*

6. *Ibid.* at para. 63.

17. Respondents were unambiguously required, at the time of SOIQ closing, to provide the inertial matrix of the vehicle and Annex H did not in any way relieve them of the mandatory requirement of supplying the said matrix.

18. In its review of the SOIQ, the Tribunal notes the following examples of specifications where, in the instructions to respondents, it is clear that *only* the certificate of compliance (Annex H) would be required to ensure compliance to the mandatory requirements:

<b>ID</b>	<b>Vehicle System Requirements Specification</b>	<b>Type of Requirement</b>	<b>Instructions To Respondent</b>
SOIQ-VSRS 115	At time of RFP closing, the TAPV underbelly mine protection shall provide protection to its occupants against a NATO level 3B mine blast IAW <i>STANAG</i> 4569 Annex B, when tested IAW AEP-55 vol 2 Edition 1.	Mandatory	The submission of the completed Annex H – Certificate of Compliance shall signify compliance with this requirement for SOIQ purposes. Respondents may be required to provide substantiation at time of RFP closing.
SOIQ-VSRS 233	The TAPV ballistic protection (not including transparent armour) shall be scalable in order to lower the higher protection level down to basic level 1 or 2 for training purposes.	Mandatory	The submission of the completed Annex H – Certificate of Compliance shall signify compliance with this requirement for SOIQ purposes. Respondents may be required to provide substantiation at time of RFP closing.

19. The Tribunal is of the view that the SOIQ was clear as to the instances when Annex H alone would be sufficient and when respondents would be required to provide additional information.

20. The SOIQ, in this case, required bidders to *not only* state compliance in Annex H, it required them to additionally substantiate compliance with regard to the blast protection (inertial matrix).

21. The Tribunal therefore believes that PWGSC was reasonable to assess Navistar's blanket statement of compliance under Annex H as insufficient to meet all the criteria of the SOIQ, in particular SOIQ-VSRS 116 and 117, and to take notice of the missing information in the proposal.

22. The Tribunal also gives little weight to the argument that Navistar could not supply the inertial matrix of the TAPVs as it was impossible to do so without further specifications and information as to the final configuration of the vehicle.

23. Nowhere in the SOIQ is it mentioned that further details will be supplied at a later date or through the future issuance of the RFP.

24. Also, in *Info-Electronics H P Systems Inc.*,<sup>7</sup> the Tribunal held that bidders have the onus to seek clarification before submitting an offer if they believe the wording or a requirement of a solicitation is unclear or ambiguous. Consequently, if Navistar had difficulty understanding SOIQ-VSRS 116 and 117, it could have sought further information in the question and answer process in order to obtain the details required to tailor an adequate proposal.

25. Since Navistar did not seek out this information and proceeded to file its bid notwithstanding an alleged lack of details, the Tribunal cannot give merit to this claim.

### SOIQ-VSRS 389

26. With respect to SOIQ-VSRS 389, Navistar admits it did not provide modelling, analysis or actual test results, but claims it was sufficient to provide, in addition to Annex H, a brochure specifying that the vehicle has a payload range of 5,000 lbs to 8,500 lbs (being approximately 2,268 kg to 3,855 kg).

27. Navistar submits that PWGSC acknowledged the brochure during the debriefing, but did not consider it satisfactory.

28. According to Navistar, it was unreasonable for PWGSC to reach this conclusion because the lowest range of payload capacity exceeds the minimum capacity (i.e. 2,000 kg) required in SOIQ-VSRS 389.

29. Navistar also submits that any firm determination of a payload capacity would be useless since there are endless configurations of components that could be added to the vehicle. Navistar submitted that providing a payload capacity range rather than a calculated number was perfectly appropriate at this stage of the procurement.

30. The Tribunal notes that in the instructions to respondents for that specification, PWGSC advises that “[t]his documentation/data could be in the form of modelling, analysis, or actual test results.”

31. The Tribunal is of the view that SOIQ-VSRS 389 was clear as to the required information.

32. The Tribunal believes that while the requirements of SOIQ-VSRS 389 was not an exhaustive list of what could be provided, it did however require that the information be substantiated in order to achieve compliance.

33. The deliberate use of words such as “modelling”, “analysis” and “actual test results” implies more than mere affirmation of a certain fact and points to a more demonstrative approach.

34. The terms used in SOIQ-VSRS 389 are defined as follows:

modelling: “. . . to produce a representation or simulation of . . . to construct or fashion in imitation of a particular model . . .”<sup>8</sup>

analysis: “. . . an examination of a complex, it’s elements, and their relations . . .”<sup>9</sup>

35. Accordingly, Navistar could not simply rely on stating capacity, they needed to actually describe how they obtained their numbers. The language used clearly requires more than a simple assertion.

---

7. (2 August 2006), PR-2006-012 (CITT).

8. *Merriam-Webster’s Collegiate Dictionary*, 10th ed., s.v. “modelling”.

9. *Ibid.*, s.v. “analysis”.



36. Contrary to Navistar's position, the Tribunal concludes that PWGSC's assessment of Navistar's brochure, which included a mere assertion of payload capacity and did not include any demonstrative documentation or data as required by the SOIQ, was reasonable.

37. For this particular mandatory requirement, the Tribunal's views are not changed by the existence of Annex H as it does not in any way mention the certificate of compliance as opposed to SOIQ-VSRS 116 and 117. Again, the Tribunal does not see Annex H as a blanket document allowing for immediate and complete compliance.

38. As already mentioned above, the Tribunal believes that its decision in *Info-Electronics H P Systems Inc.*, also applies to this aspect of the complaint. Again, if Navistar had a problem understanding SOIQ-VSRS 389, it should have sought clarification from PWGSC before it responded to the SOIQ, rather than relying on assumptions or adopting a wait-and-see attitude with respect to the outcome of the procurement.

39. In reaching this conclusion, the Tribunal is also mindful of its decision in *MTS Allstream*<sup>10</sup> where it failed to see how the requirement to demonstrate compliance with specific mandatory requirements would add any meaning to a proposal. The Tribunal believes that the *MTS Allstream* inquiry is distinguishable from the present.

40. The RFP at issue in *MTS Allstream* required bidders to specify compliance or non-compliance with each individual mandatory criterion and provide supporting statements or documentation to substantiate compliance in every instance. In that decision, the Tribunal adopted the following position:

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.

41. In the present case, by contrast, SOIQ-VSRS 116, 117 and 389 required more than a simple statement of compliance in order to meet mandatory requirements. As already discussed above, the Tribunal does not adhere to the position that a signed Certificate of Compliance (Annex H) served as a blanket tool to "fill in the gaps" where deemed useful by the bidder.

42. For SOIQ-VSRS 116, 117, there were specific requirements above and beyond the scope of Annex H, which was to be merely used in a complimentary way in the event that part of the information was not immediately available. Again, as already discussed, Annex H did not relieve Navistar of certain specific requirements.

43. As for SOIQ-VSRS 389, it is completely silent as to Annex H.

44. There are certain requirements of the SOIQ-VSRS, where this Certificate of Compliance would have been sufficient, but others, such as those at hand, clearly required more, therefore clearly distinguishing the present complaint in fact and in law from the teachings of *MTS Allstream*.

---

10. (3 February 2009), PR-2008-033 (CITT).

45. To adopt Navistar's position as to the role of Annex H would render the entire evaluation process moot, as only one document (Annex H) would suffice to render the entire SOIQ compliant on all accounts. This is clearly not how the SOIQ was devised.

46. As for Navistar's other protestations to the effect that certain aspects of the specifications in issue were premature or inappropriate, these are untimely.

47. Navistar should have objected to PWGSC earlier or filed its complaint with the Tribunal earlier. Subsections 6(1) and 6(2) of the *Regulations* give potential bidders no more than 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. Navistar should reasonably have known that no more amendments would be issued and the specifications would go unchanged at the time the SOIQ closed.

48. Consequently, if Navistar had difficulty with SOIQ-VSRS 116 and 117 or 389, it had the onus to object to PWGSC or file a complaint to the Tribunal 10 working days from June 2, 2010, when the SOIQ closed, i.e. by June 16, 2010. The earliest it could be said that Navistar objected to the wording of these specifications is July 19, 2010—well beyond the time limit.

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

## **DECISION**

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

Jason W. Downey  
Jason W. Downey  
Presiding Member