CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, April 16, 1996

File No.: PR-95-023

IN THE MATTER OF a complaint filed by Array Systems Computing Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsection 30.15(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services issue a competitive solicitation for the requirement in accordance with the provisions of the *Agreement on Internal Trade*.

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
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File No.: PR-95-023

Date of Determination:	April 16, 1996
Tribunal Member:	Desmond Hallissey
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Joël J. Robichaud
Complainant:	Array Systems Computing Inc.
Intervener:	Computing Devices Canada Ltd.
Government Institution:	Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

Introduction

On January 5, 1996, Array Systems Computing Inc. (the complainant) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act) concerning the procurement by the Department of Public Works and Government Services (the Department) (Solicitation No. QF W8471-5-JWZ1/000/A), on a sole source basis from Computing Devices Canada Ltd. (CDC), for the supply of six AN/SQS-510 sonar systems and modifications to two identical sonar systems for the Iroquois class ships for the Department of National Defence (DND).

The complainant alleges that the Department intends to limit the receipt of offers to one supplier, CDC, without meeting the requirements for limited tendering set out in the *Agreement on Internal Trade*[2] (the AIT). The complainant requested, as a remedy, that the planned sole source to CDC be cancelled. In addition, a fair and open competition should be initiated for the procurement of the AN/SQS-510 sonar systems, based on commercial off-the-shelf (COTS) technology, meeting essential military specifications and standards. Finally, the Department should ensure access by potential bidders to all Crown assets relating to the AN/SQS-510 sonar systems.

The Inquiry

On January 9, 1996, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[3] (the Regulations) had been met in respect of the complaint and decided to conduct an inquiry into whether the procurement was conducted in accordance with the requirements set out in Chapter Five of the AIT.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. As signed at Ottawa, Ontario, on July 18, 1994.
3. SOR/93-602, December 15, 1993, Canada Gazette Part II, Vol. 127, No. 26 at 4547, as amended.

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On February 5, 1996, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4] The complainant's comments on the GIR were subsequently filed with the Tribunal. The Department filed its final comments with the Tribunal on February 27, 1996.

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 information on file.

Procurement Process

In June 1993, the Procurement Review Committee[5] recommended, in part, that the acquisition of twelve AN/SQS-510 sonar systems for the Halifax class frigates, with an option for the acquisition of up to eight similar sonar systems for the Iroquois class ships, be directed to CDC. The requirement was not covered by either the *North American Free Trade Agreement*[6] (NAFTA) or the AIT. These agreements were not in force at that time. As well, the requirement was not covered by the *Canada-United States Free Trade Agreement*[7] (the FTA), in force at the time, since the procurement's estimated value was above the then applicable FTA upper monetary threshold, and it related to a class of goods (Federal Supply Classification, Group 58 [Communication, Detection, and Coherent Radiation Equipment]) excluded from the coverage of the FTA and NAFTA when procured by or on behalf of DND. The Department states in the GIR that the contract awarded to CDC on September 3, 1993, did not include an option for the acquisition of additional sonar systems for the Iroquois class ships because of budgetary reasons.

On November 16, 1995, DND submitted a requisition to the Department for the supply of six AN/SQS-510 sonar systems and upgrades to two other sonar systems previously acquired under another program.

On November 21, 1995, an Advance Contract Award Notice[8] (ACAN) was published on the Open Bidding Service. The ACAN appeared in the November 24, 1995, issue of Government Business Opportunities. The ACAN with the code designation 0-3, meaning not subject to NAFTA and generally

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4. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912, as amended.
5. The procurement review mechanism headed by the Procurement Review Committee involves an interdepartmental procurement review process to identify regional and industrial opportunities on goods and services contracts valued over $2 million or judged to have a significant socio-economic impact regardless of value. The mechanism must be consistent with Canada's obligations under various international procurement agreements. See Treasury Board Manual - Capital Plans, Projects and Procurement, Chapter 3.2, Procurement Review Policy.
6. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
7. Canada Treaty Series, 1989, No. 3 (C.T.S.), signed on January 2, 1988.
8. Notice to signal to potential suppliers the government's intent to limit tendering generally to one supplier and to indicate the justification therefor. This approach is designed to inform the supplier community of the government's intent and to afford potential suppliers an opportunity to let the government know whether or not an alternate source of supply exists.

open to one firm only, identified CDC as the intended supplier. It further stated that the reason to limit tendering was permissible contract award process (CAP) code 74. The meaning of CAP code 74 is set out in full in the Department's procedure dated January 1, 1996, as follows: "For logistic reasons (i.e. where additional deliveries by the original supplier are intended either as replacement parts for existing supplies, or installations, or for continuing services, or as the extension of existing supplies, services or installations, where a change of supplier would compel the client to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services)." Immediately under the words "CAP Code: 74," the procedure reads: "Solicitation Types: N, W, I, S, O, L," meaning N - NAFTA, W - World Trade Organization—*Agreement on Government Procurement*, I - the AIT, S - Science and Technology, O - Open Bidding and L - Comprehensive Land Claims Agreements.

On November 29, 1995, the complainant wrote to the Department, requesting any information relating to the limited tendering justification for this procurement. This was done to better understand the limited tendering justification beyond that outlined in the ACAN, if any. On November 30, 1995, the Department responded to the complainant's request as follows:

> *LIMITED TENDERING JUSTIFICATION FOR IROQUOIS AN/SQS-510*
>
> *The current requirement for AN/SQS-510 Sonar Systems is an extension of the '510 Project' which has been under contract since 1993. The proposed contractor is the original equipment manufacturer and has completed all related research and development work for the Department of National Defence (DND). As well, the proposed Contractor alone possesses the necessary in-depth comprehensive knowledge and experience of the detailed design of the hardware and software of the AN/SQS-510 Sonar System and has installed this system on two DND ships and several Portuguese Navy ships.*
>
> *Mandatory elements for this requirement include but are not limited to:*
>
> *a. The contractor must possess demonstrated technical skill and knowledge to produce the current AN/SQS-510(V)4 in the required time-frame as soon as possible, with minimum risk to schedule and cost;*
>
> *b. The contractor must possess demonstrated technical skill and knowledge to upgrade the two 510 systems presently in service in HMCS NIPIGON and TERRA NOVA to the 510(V)4 baseline with minimum risk to schedule and cost;*
>
> *c. The IROQUOIS 510 procurement must be capable of dovetailing into the HALIFAX class procurement in that as systems are delivered from both contracts they will be installed in ships that are available - either IROQUOIS or HALIFAX class. Therefore it is essential that the IROQUOIS 510 system be identical in fit, form, and function and fully interchangeable to that already acquired under the HALIFAX class procurement;*
>
> *d. The contractor must be ISO [International Organization for Standardization] 9001 certified and follow specified DND and MIL-STD [Military Standard] practices for technical and logistics documentation, packaging, system hardware and software specification and development, and configuration and change control; and*
>
> *e. The Government Furnished Equipment (GFE) consisting of a 510 target system, the Program Generation Centre is now residing at the facility of the proposed Contractor*

and is in use in fulfilment of the CPF 510 requirement. This GFE is absolutely required for the IROQUOIS requirement.

Examples of the essential requirements which would be point-rated in an evaluation criteria follow:

a. IROQUOIS 510 procurement must be viewed in the continuum of 510 and CANTASS [Canadian Towed Array Sonar System] system procurement for the Canadian Navy. Commonality with other fleet fitted systems is essential to reduce ILS [integrated logistic support] costs particularly for spares, documentation, training and R&O [Repair and Overhaul];

b. The AN/SQS-510(V)4 is qualified to specified standards to meet the environmental and operational requirements for ship board use. These requirements are essential.

On December 1, 1995, the complainant challenged the Department's planned sole source procurement. In summary, the complainant submitted that it could meet all of the Department's requirements, except for the requirement that the contractor possess documented technical skill and knowledge to produce the current sonar system, and that, consequently, sole sourcing was not justified in this case. In fact, the complainant stated that it could meet DND's needs while achieving compatibility with the existing equipment and that it could do this while using superior COTS-based technology (ruggedized COTS technology) to be assembled and tested to military requirements within an acceptable time frame and risk and at a lower life cycle cost. On the issue of the use of the word "current" in the above context, the complainant submitted that this seems intended only to exclude the improved implementation which the complainant plans to offer. In any event, competition should be allowed to play. Denying it will severely undermine the government's buying strength unnecessarily.

On December 20, 1995, the Department answered the complainant's challenge of the ACAN. The Department's letter states, in part:

The offer presented by Array Systems proposes a development project whereby 510 software would be ported to commercially available hardware. The proposal suggests this approach is a low risk endeavour that would provide a considerable cost savings over the life of the system. The porting of the 510 signal processing (UYS-501) software to commercially available technology is a non-trivial exercise that is by no means guaranteed to succeed. The Advance Contract Award Notice (ACAN) is for the production of an additional quantity of eight AN/SQS-510(V)4 Sonar Systems. There will be no development involved with this procurement.

The AN/SQS-510 sonar is the standard sonar for the Canadian Navy and is being provided to the fleet ASW [antisubmarine warfare] capable assets, i.e. the HALIFAX and IROQUOIS classes. Extensive performance trials and qualification tests have proven the 510 sonar's capabilities to meet these requirements. In 1993 a contract was issued for the supply of twelve AN/SQS-510 sonars for the Halifax Class Frigates. This requirement for eight sonars for the Iroquois Class Ships is a continuation of the Canadian Naval requirement to provide 510 sonars fleet wide. The choice of the 510 for the Canadian Navy

is consistent with the goal of reducing Naval operations and maintenance costs, as these sonars share spare parts, maintenance, training, software support, and repair and overhaul infrastructure with the Canadian Towed Array Sonar System.

The Crown will be proceeding with the sole source procurement of eight AN/SQS-510(V)4 sonar systems from Computing Devices Canada Ltd. as this meets the operational requirement of the Department of National Defence.

On January 5, 1996, the complainant filed this complaint with the Tribunal.

Validity of the Complaint

The Complainant's Position

In its comments on the GIR, the complainant submits that the Department's justification to sole source this requirement is not valid. It submits that, given the potential for savings to the taxpayer, the Department is not justified in surrendering the buying power, inherent in an open competition, in favour of the sole source option. The GIR contains much extraneous material which cannot be traced to the original ACAN rationale. Moreover, in the GIR, the Department advances only two arguments which can be traced to the AIT, notably Article 506.12(a) relating to "compatibility" and "exclusive rights." Of these two arguments, the complainant further submits, only the one on compatibility is traceable to the rationale used in the ACAN. Accordingly, the complainant argues that the subject of exclusive rights should not be considered by the Tribunal in this instance. The complainant finally contends that the Department's arguments and its interpretation of Article 506.12(a) of the AIT, in particular, constitute an infringement of Article 504.3(b) of the AIT concerning the biasing of technical specifications.

More specifically, the complainant submits, in part, that the Department's effective redefinition of the word "compatible" into the word "identical" has created an overly restrictive technical specification. The compatibility requirement in the AIT only extends to goods and not to services, infrastructure and anything that is not a product. Proprietary rights are not a limiting factor in this instance. Though the Department argues that a "no development" requirement was not invoked to justify sole sourcing, a bias against development work permeates virtually every paragraph of the Department's arguments. Contrary to the Department's assertion, formal ISO 9001 certification or qualification is not required by the proposed contract. While the Department appears to minimize the complainant's achievement and expertise, verifiable projects demonstrate that, in fact, it is at the forefront in implementing ruggedized COTS technology in operational DND vehicles and in analyzing and testing logistics, support and cost implications. Concerning risk, the complainant submits that it is a subjective factor and, in any event, the Department has not proven that it has a requirement for risk tolerance that the complainant cannot meet. Pricing arguments are, in essence, speculative in nature at this stage and cannot be used as a limiting factor. The complainant can meet the 33-month total schedule, as originally identified for CDC. Finally, the complainant submits that the Department unfairly assessed certain cost drivers (i.e. technical review, testing, including sea tests, documentation and hardware modification) applicable to the AN/SQS-510 sonar systems as if these cost drivers only affected the COTS 510 solution that it proposed. In fact, these cost drivers also apply, to some extent, to CDC.

In conclusion, the complainant states that, if opting for a new supplier can satisfy the operational requirements of DND at a lower cost, even when accounting for new development, then this is the route that should be taken. Open competition is the most efficient way to establish the best fit for the requirement at the most cost-effective level, and the bid challenge process should not replace the process of open competition in the selection of suppliers.

The Department's Position

In its response to the complaint and subsequent submission, the Department submits that a sole source procurement of the AN/SQS-510 sonar systems from CDC does not contravene the AIT, as the procurement is for additional deliveries by the original supplier to ensure compatibility. A change in supplier would compel DND to procure equipment which would not meet the navy's requirements of compatibility and interchangeability with existing equipment and commonality for the fleet. The Department argues that this is the prime reason that it invoked in the ACAN, but this was not the only rationale. For example, proprietary data rights were another reason. The sonar system proposed by the complainant does not exist and, consequently, it cannot be considered compatible or interchangeable. In addition, the sonar system proposed by the complainant would have to be developed and tested extensively, including sea trial, to verify its performance. Further, the provision of the entire AN/SQS-510 software is not feasible since the property thereof is shared by the Crown and CDC. The Department further submits that the AN/SQS-510 sonar system has been developed by DND to meet exacting and unique operational requirements essential for the sonar to operate effectively and reliably under harsh environmental and battle conditions. The sonar must also be considered as an integral part of the naval logistic support system which provides for: (1) spare subcomponents to repair the sonar; (2) the infrastructure to repair and procure spare parts; (3) specific training for operators and maintainers; (4) complete and accurate technical data, such as manuals and drawings; (5) a capability to generate software changes and updates; and (6) test and measurement equipment unique to AN/SQS-510 sonar systems.

Specifically, while recognizing the complainant's capability to port signal processing software functionally to commercially available hardware, the Department states that this capability has only been tested in a benign "office environment" for non "mission critical" systems. Due to the sharing of ownership for certain intellectual property rights with CDC, the Crown is not at liberty to transfer to the complainant all the information that it needs to perform this requirement. Though risk is a relevant factor in this instance, it was not the prime reason for justifying limited tendering. In fact, the Department states that the requirement to "ensure compatibility with existing products that must be maintained by the manufacturer or its representative" is the limited tendering justification. The Department also states that "no development" is not a requirement of this solicitation and that it used these words only to show that the solution proposed by the complainant was for a "concept," not a proven product, and, as such, it could not demonstrate that it met the requirement of the navy.

This procurement, the Department submits, is "an extension of supplies to ensure compatibility." A change in supplier would compel DND to procure equipment and services not meeting the requirements of commonality, compatibility and interchangeability with already existing equipment or services. Moreover, compatibility has a significant human dimension (i.e. personnel structure and mobility, workloads, training, optimization of doctrine and tactics) which cannot be ignored. In some respect, the Department argues, the

complainant seems to be suggesting that DND review and change its requirements to accommodate the complainant. In this context, the Department submits that the technical specifications for the AN/SQS-510 sonar systems were not developed to eliminate competition, but rather to allow the sonar to meet DND's operational requirement and to ensure that both the Halifax and Iroquois class ships be similarly outfitted. In addition, given that the sonar proposed by the complainant does not yet exist, it cannot be considered "Off the Shelf." The AN/SQS-510 sonar system, for its part, does embody ruggedized commercial components, e.g. BARCO monitors, and can, in some respect, be considered a COTS system. The Department also submits that the complainant's assertion that life cycle costs would be greatly reduced by entertaining the development of its proposed COTS system is clearly wanting because it ignores, for example, sunk costs. The Department adds that, though the proposed sonar could be developed to fit the ships' systems interfaces, that is, be mechanically and electrically compatible by design, it would include unique hardware and software, thereby being non-interchangeable and non-compatible with the support infrastructure.

The Department submits that the complainant misinterpreted the Request for Proposal (RFP) in many areas, for example, the delivery schedule and the requirement to conduct tests and technical reviews. The Department argues that, in such instances, the complainant failed to recognize that the draft contract in the RFP is that of the previous Halifax class contract and that it was used, in this instance, simply as an example.

In summary, the Department states that DND has the right and the obligation to decide its own operational requirements and technical requirements. In this instance, the DND requirement is for a number of AN/SQS-510 sonar systems, which are already fully developed, fully tested, integrated and proven systems, manufactured by a contractor that is ISO 9001 qualified. "Array's yet to be developed concept does not meet this requirement."

The Tribunal's Decision

Section 30.14 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 prescribed procedures and other requirements in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the AIT.

Article 506.12 of the AIT provides, in part, that:

> *Where only one supplier is able to meet the requirements of a procurement, an entity may use procurement procedures that are different from those described in paragraphs 1 through 10 in the following circumstances:*
>
> *(a) to ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;*

Article 504.3 of the AIT provides, in part, that:

> *Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:*
>
> *(b) the biasing of technical specifications in favour of, or against, particular goods or services, ... or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;*

Article 501 of the AIT provides, in part, that the purpose of Chapter Five is to "establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

After careful consideration of the evidence and arguments presented, the Tribunal determines that the complaint is valid. The Tribunal has reached this conclusion based on a determination that the procurement was not conducted in accordance with the provisions of the AIT. Specifically, the Department has failed to follow the provisions of Article 506 of the AIT that apply to this procurement.

Article 506.12 of the AIT authorizes the Department to "use procurement procedures that are different from those described in paragraphs 1 through 10 in" certain circumstances. The Department submits that the requirement to "ensure compatibility with existing products that must be maintained by the manufacturer or its representative" is the limited tendering justification for this procurement. The Tribunal is of the view that, although in its letter to the complainant on November 30, 1995, the Department presented many valid considerations that could be taken into account when evaluating proposals in a competitive action, these considerations, in themselves, did not necessarily require eliminating all but one supplier from this procurement. The Department also submits that there is additional justification for using limited tendering since certain proprietary rights are shared between the government and the proposed contract awardee. Exclusive rights, such as exclusive licences, copyright and patent rights, are specified in the AIT as reasons for using "procurement procedures that are different from those described in paragraphs 1 through 10." This reason was not raised in the original ACAN nor in the Department's letter of November 30, 1995, which described at length the Department's reasons for using limited tendering. In any event, the Tribunal is of the opinion that the Department has failed, in this instance, to show that the shared intellectual property rights would prevent the complainant from being able to meet its requirements. The first few words of Article 506.12 of the AIT read: "Where only one supplier is able to meet the requirements of a procurement." The Tribunal is of the view that this requirement is very stringent and, since limited tendering is an exception to the general rule to provide equal access to procurement, there is a significant responsibility on the Department to prove that this condition applies, especially when a supplier, other than the one chosen, maintains that it can meet the requirements.

In the case at hand, the Department has not proven that there is only one supplier that can meet the requirement for compatibility with existing products. It is the Tribunal's opinion that, where a supplier is presenting a reasonable argument that it can meet the Department's requirements and that it is willing to assume the costs and risks inherent in successfully challenging the incumbent, conducting a competitive procurement is the best way to determine the validity of such assertions. This does not mean that the Department must compromise its requirements, but it does mean that the Department must examine what

the supplier community has to offer. Competition through equal access should be considered by the Department to be the norm when it comes to procurements and limited tendering to be the exception.

In the letter sent by the Department to the complainant on December 20, 1995, phrases such as "the offer presented by Array Systems" and "the proposal suggests" seem to imply that the complainant's objection to the ACAN was being evaluated as if it were a proposal in response to an RFP. The complainant submits that the bid challenge process should not replace the process of open competition in the selection of suppliers. The Tribunal agrees with this statement and also adds that the ACAN procedure should not replace the process of open competition in the selection of suppliers.

The Department submits that a change in supplier would compel DND to procure equipment and services not meeting the requirements of commonality, compatibility and interchangeability with already existing equipment or services. While noting that the notions of commonality and interchangeability are not included in the AIT, the Tribunal is of the view that a properly conducted competitive procurement that reflects the true operational and technical requirements of DND cannot result in compelling the Department to procure equipment or services that do not meet its needs, including compatibility with existing products.

Determination of the Tribunal

Pursuant to section 30.14 of the CITT Act, the Tribunal determines that the complaint is valid and, pursuant to subsection 30.15(2) of the CITT Act, recommends, as a remedy, that the Department issue a competitive solicitation for the requirement in accordance with the provisions of the AIT.

Desmond Hallissey
Desmond Hallissey
Member