

Ottawa, Monday, April 19, 1999

File No.: PR-98-039

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

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 subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that any future procurement for forward looking infrared imaging systems for the Department of National Defence, including that relating to the Sea King aircraft, be conducted in accordance with the provisions of the applicable trade agreements.

The Canadian International Trade Tribunal further recommends that the Government compensate Wescam Inc. in the amount of \$15,000 for being deprived of the opportunity to compete for this procurement and to possibly profit therefrom.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Wescam Inc. its reasonable costs incurred in relation to filing and proceeding with the complaint.

Anita Szlazak

Anita Szlazak
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: April 19, 1999

Tribunal Member: Anita Szlajak

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Gilles B. Legault

Complainant: Wescam Inc.

Counsel for the Complainant: Gregory O. Somers
Paul D. Conlin

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

COMPLAINT

On January 19, 1999, Wescam Inc. (Wescam) 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 CITT Act) concerning the procurement (Solicitation No. W8485-9-1016/A) by the Department of Public Works and Government Services (the Department) on a sole-source basis from GasTOPS Ltd. (GasTOPS) of six refurbished forward looking infrared imaging (FLIR) systems, Model 2000G,² for the Department of National Defence (DND).

Wescam alleged that the reasons advanced by the Department in the Advance Contract Award Notice³ (ACAN) and in its correspondence dated January 7, 1999, to justify its derogation from the requirements of Articles 506(1) to (10) of the *Agreement on Internal Trade*⁴ (the AIT) are not valid.

Wescam requested, as a remedy, that the Tribunal stop the award of a contract in this solicitation. In addition, it requested that the planned sole-source award be cancelled and that an open and fair competition for the procurement be held. In the alternative, Wescam requested reasonable compensation for loss of profits and subsequent direct and indirect damages to its reputation in the Defence supplier community. Wescam also requested its costs in support of the complaint.

On January 22, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁵ (the Regulations). That same day, the Tribunal issued an order

1. R.S.C. 1985, c. 47 (4th Supp.).
2. A thermal imager that recognizes terrain data in dark areas based solely on temperature differences as opposed to visible wavelengths of light. The image is displayed on a monitor. In circumstances in which night missions are flown, the FLIR 2000G system permits the sky, water, ground, vegetation, other aircraft, wires, personnel and buildings to appear on the FLIR screen in different shades of black and white.
3. A notice of intent to solicit a bid and negotiate with only one firm. This is not a competitive bid solicitation notice. Suppliers, however, on or before the closing date indicated, may identify their interest and demonstrate their capability to perform the contract.
4. As signed at Ottawa, on July 8, 1994.
5. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

postponing the award of any contract in relation to this solicitation until the Tribunal decided the merits of the complaint. On January 25, 1999, the Department informed the Tribunal that a contract in the amount of \$962,178.24 was awarded to GasTOPS on January 20, 1999. Consequently, on January 27, 1999, the Tribunal rescinded its postponement of award order of January 22, 1999. On February 26, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶ On March 10, 1999, Wescam filed its comments on the GIR with the Tribunal. On March 18, 1999, the Department filed additional comments with the Tribunal, and Wescam's response thereto was filed with the Tribunal on March 22, 1999.

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 the record.

PROCUREMENT PROCESS

According to the Department, in early December 1998, DND was notified by FLIR Systems, Inc. (FSI) that six refurbished FSI FLIR 2000G systems were available for purchase on a first come, first served basis. On December 24, 1998, the Department received a requisition from DND for the purchase of those six refurbished FSI FLIR 2000G systems. By letter dated December 29, 1998, FSI informed the Department that GasTOPS was its exclusive designated agent in Canada for the Canadian Forces FLIR 2000G systems.

An ACAN for the requirement was posted on Canada's Official Electronic Tendering Service (MERX) on January 6, 1999, with a closing date of January 18, 1999.

On January 6, 1999, Wescam communicated, by facsimile, with the Department offering an alternate system, the WESCAM 12DS, and stating that the procurement should be competitive. On January 7, 1999, Wescam was informed verbally by the Department that the requirement was for refurbished FLIR systems. Wescam, however, insisted that its product would be lower in cost and was compatible with the FLIR 2000G systems. As a result of this communication, the Department requested DND to review Wescam's January 6, 1999, letter.

By facsimile dated January 7, 1999, the Department forwarded DND's comments on Wescam's letter of January 6, 1999, as follows:

This is not a new initiative but rather an increase in our inventory. We currently own qty. 14 FLIR 2000G systems and want to get to 20 (ie. buying 6 more). The FLIR 2000G R&O [repair and overhaul] Contract is already in place. Both technicians and aircrew are already trained on the FLIR 2000G. Bringing a new system in (Wescam) would necessitate a prototype and trial and if successful, could result in a mixed bag (ie. two types of FLIR). Not desirable (creates deployment problems). Although a FLIR system, the Wescam is not form-fit-function and would require some aircraft modifications. All 30 Sea King aircraft are already fitted-for-but-not-with the FLIR 2000G model. This was an expensive mod [modification] program. It is intended to press on with the sole source to GasTops.

6. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

On January 8, 1999, Wescam responded to the Department's facsimile of January 7, 1999, in part, as follows:

We understand the concerns expressed about having more than one system in the inventory for the Sea King Fleet. While these concerns are valid they should not preclude the investigation of all options for infrared imaging systems to ensure that the Canadian Forces get the best value for their money.

Wescam believes that maintenance concerns can be somewhat alleviated by the fact that the Wescam system requires very minimal first line maintenance and that the maintenance required can be performed with no special tools. The Wescam system would be covered by warranty for the first twelve months and convenient support plans are available after that period. The WESCAM™ 12DS is currently in production and spares and replacement parts will be available for a number of years. It is our understanding that the FSI 2000G is no longer in production and spares will become difficult to obtain.

Your facsimile says that aircraft modification would be required to fit the WESCAM™ 12DS, this is not the case. Wescam has installed the system on several aircraft previously fitted with the FSI 2000G with no modification of the attachment point or aircraft wiring. As I stated in my letter, we would be pleased to demonstrate this capability.

The conversion of an experienced infrared system operator to the WESCAM™ 12DS requires very modest training and the ease of operation ensures that proficiency is easily maintained.

One option to relieve the concerns about deployment of systems and spares may be to utilize the Wescam system only on the West Coast where a smaller number of helicopters are deployed.

On January 11, 1999, the Department contacted Wescam again to communicate additional reasons invoked by DND for not changing its course of action in the matter. The Department's communication informed Wescam that "[t]he Sea King Community does not want to introduce a new FLIR system to its inventory. The Sea King aircraft deploy onboard HMCS Ships which travel the world. The introduction of a new system would create significant logistic problems. This requirement will not be competed."

An amendment to the ACAN was issued on January 12, 1999, indicating that the requirement was for "refurbished" FLIR systems.

VALIDITY OF THE COMPLAINT

Department's Position

The Department submitted that it correctly applied the provisions of Article 506(12)(a) of the AIT to this procurement. The rules of the procurement system, the Department submitted, are not intended nor should they be interpreted to interfere with the ability of DND to determine its military, emergency and search and rescue operational requirements. The Tribunal, the Department submitted, indicated in File No. PR-95-023⁷ that, although the procuring entity must consider what the supplier community has to offer, "[t]his does not mean that the Department must compromise its requirements."⁸

7. *Array Systems Computing Inc., Determination of the Tribunal*, April 16, 1996.

8. *Ibid.* at 8.

The Department further submitted that a supplier's wishes to have its new or different or improved product procured should not override the operational requirements of DND not to mix and match instrumentation on the Sea King aircraft. This requirement for consistency of instrumentation is based on the manner in which such aircraft are utilized and deployed by DND in Canada and around the world. The Department further submitted that, according to DND, any mixing of new FLIR systems with the existing inventory of FLIR 2000G systems will negatively impact on the airworthiness and effectiveness of the Sea King fleet.

The Department submitted that it is not disputing the fact that Wescam may be in a position to offer a new and improved FLIR system. In fact, FSI itself has newer products that could compete with the WESCAM 12DS. However, the Department submitted, this fact changes nothing in DND's legitimate requirement that, for the life span of the Sea King aircraft, the same FLIR system be utilized on all aircraft in the Sea King fleet.

The Department further submitted that compatibility with existing products is required to ensure quick and efficient installation and, also, for maintenance, logistics and training reasons. These reasons, the Department submitted, are so important that DND has indicated that it would rather cancel its requirement for the refurbished FLIR systems than introduce different FLIR systems on its Sea King fleet.

The Department submitted that physical compatibility is but one of the factors that can be considered in determining compatibility with existing products. Moreover, the Department submitted that Article 506(12)(a) of the AIT specifically contemplates compatibility with existing products as a justification for limited tendering and does not require, as submitted by Wescam, that compatibility be determined through a competitive solicitation.

The Department also submitted that FSI no longer manufactures the FLIR 2000G system. Consequently, six refurbished models are being procured, rather than new FLIR systems, in order to ensure compatibility with the existing Sea King products. Finally, the Department requested the opportunity to make submissions with respect to the award of costs in this matter.

In its additional comments dated March 18, 1999, the Department submitted that Wescam did not identify itself as a supplier of FLIR 2000G systems when it challenged the ACAN. The Department submitted that it has difficulty in understanding why Wescam did not challenge the ACAN on this basis rather than try to convince DND to procure a different system (WESCAM 12DS) altogether.

The Department submitted, finally, that Wescam misinterpreted the Department's statement of fact in the GIR, which indicated that DND was familiar with Wescam and its line of FLIR systems because one model (the 16SS-A) was installed on the UTTH helicopter. Throughout the GIR, all comparisons made by DND were strictly between the FLIR 2000G and the WESCAM 12DS.

Wescam's Position

In its opening comments, Wescam submitted that Article 506(12)(a) of the AIT does not apply, in the circumstances, because: (1) the WESCAM 12DS is compatible with the FSI FLIR 2000G and can fulfil the requirements of the procurement; or (2) Wescam can supply refurbished FLIR 2000G systems, as can other Canadian and US suppliers. Wescam further submitted that the WESCAM 12DS, although a new FLIR system and not a refurbished one, can meet the requirements of the procurement.

With respect to DND's assessment of the compatibility of the WESCAM 12DS with the FSI FLIR 2000G, Wescam submitted that DND, in its initial response, relied on an incorrect comparison based on its prior procurement for use on UTTH helicopters of a different FLIR system, the 16SS-A. The WESCAM 12DS, proposed by Wescam in this instance, was specifically designed to be mounted on aircraft that were fitted for the FLIR 2000G system, in order to avoid the necessity of any aircraft mounting modifications where FLIR 2000G systems were used. Moreover, Wescam submitted, the compatibility comparison between the WESCAM 12DS and the FSI FLIR 2000G systems, now relied upon by the Department in the GIR, was conducted approximately one month after the contract was awarded and on the basis of information provided by FSI and GasTOPS, not by Wescam. Wescam submitted that it never was given the opportunity to supply complete objective information on the compatibility of the WESCAM 12DS with the FLIR 2000G. Furthermore, Wescam submitted, the "product comparison" cited in the GIR is not sufficient to justify the sole source decision.

In its submission, Wescam made a number of statements about the WESCAM 12DS, in part, as follows:

- The WESCAM 12DS is fully interchangeable with and substitutable for the FSI FLIR 2000G system.
- It can be mounted on exactly the same structural components and mounting shelves that are used for the FSI FLIR 2000G system.
- The wiring is fully compatible.
- Wavelength is independent of the image that is produced on the screen of the system. The image is identical, with superior resolution or sharpness.
- It is approximately 50 percent lighter than the 16SS-A.
- It can be fitted in the Sea King aircraft in less than one hour.
- It weighs approximately 60 pounds and is approximately 15 pounds lighter than the FLIR 2000G system.

Wescam further submitted that:

- To service the system, it is removed from the helicopter and shipped back to the service centre under a procedure referred to as line replacement and, therefore, the spare parts issue is irrelevant.
- It can supply a maintenance contract, and its products come with a one-year warranty.
- It is able to provide refurbished FLIR 2000G systems, as GasTOPS' licence applies only to new FLIR 2000G systems.
- The fully compatible WESCAM 12DS, unlike the FLIR 2000G, could be used for the life of the Sea King aircraft and then transferred to the replacement aircraft, generating considerable cost savings.
- Only minimal retraining would be required and, in any event, transition costs are not a valid justification for the use of single tendering procedures.

Furthermore, Wescam submitted, the compatibility test in Article 506(12)(a) of the AIT does not require “identical” products, “but rather implies a convergence of competing products in functionality and ease of use.” As well, Wescam submitted, the “compatibility” requirement in the AIT is a less demanding requirement than the “interchangeability” one found, for example, in Article 1016(2)(d) of the *North American Free Trade Agreement*⁹ or in Article XV(1)(d) of the *Agreement on Government Procurement*.¹⁰

Wescam submitted that the above-mentioned factors surrounding the assessment of compatibility between the WESCAM 12DS and the FSI FLIR 2000G, which was conducted by the Department, suggest “a predetermined intention to award the contract to GasTops, rather than an intention to objectively assess the compatibility of all available systems with the requirement.”

Wescam further submitted that the AIT disciplines are designed, *inter alia*, to ensure that public monies are expended on the best product for the best value. Wescam submitted that, in this particular case, the contract awarded appears to have exceeded market value for the products purchased by approximately \$48,000 per unit. Considering that a “refurbished” unit does not confer any particular quality on a product other than the fact that it already has been used, this kind of price and particularly the sourcing methodology utilized to arrive thereat are inconsistent with the purpose of reducing purchasing costs, as set out in Article 501 of the AIT.

Finally, observing the short periods of time that existed between the issuance of the ACAN, the amendment to the ACAN, the challenge made by Wescam and the date of the contract award, Wescam submitted that these rushed delays constitute a flagrant violation of sections 10.2.6 and 10.7.16 of the Treasury Board Manual entitled “Contracting,” which stipulate that only in cases where there is no valid interest or challenge and only after 15 calendar days can the proposed contract be deemed competitive. The delays used by the Department, in this instance, have frustrated Wescam’s right to a postponement of award until the Tribunal decides the merits of this complaint.

Considering that the designated contract was awarded after the filing of the complaint, Wescam requested, as a supplementary remedy, that the designated contract be terminated.

In its additional comments of March 22, 1999, Wescam submitted that, since the original ACAN, dated January 6, 1999, was for FLIR 2000G systems and considering that the ACAN was amended and republished only on January 12, 1999, indicating that the requirement was for “refurbished” FLIR 2000G systems, it was not in a position to indicate that it was a potential supplier of refurbished FLIR 2000G systems until after January 12, 1999.

With respect to the Department’s total reliance on FSI’s letter of December 29, 1998, in concluding that GasTOPS alone could supply FLIR 2000G systems, including “refurbished” ones, Wescam submitted that the Department should have inquired into the matter with other suppliers, particularly in view of the fact that FSI was the intended sole source supplier through its Canadian agent, GasTOPS.

As for the Department’s assertion that all comparisons between the FSI FLIR 2000G systems and Wescam’s products were made on the basis of the WESCAM 12DS, Wescam submitted that the

9. 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).

10. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

Department's submissions confirmed that neither DND nor the Department had a WESCAM 12DS. Consequently, a proper comparison could not have been conducted.

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 procedure and other requirements prescribed 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 concluded in accordance with the requirements set out in the AIT.

Article 501 of the AIT provides, in part, that "the purpose of this Chapter [Procurement] 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."

Article 504(3)(b) of the AIT provides that "the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter" is inconsistent with the principle of non-discrimination.

Article 504(3)(c) of the AIT prohibits "the timing of events in the tender process so as to prevent suppliers from submitting bids."

Article 506(9) of the AIT provides that, "[i]f a procurement exempted from the obligations of this Chapter under paragraph 11 or 12 or Article 507 or 508 is publicly tendered in a daily newspaper or on an electronic tendering system, the tender notice shall indicate the restrictions and highlight the practices that do not conform with this Article or Article 504."

Article 506(12) of the AIT provides, in part, that, "[w]here 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; (b) where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and **no alternative or substitute** exists." (Emphasis added)

Essentially, the Tribunal must determine whether the circumstances invoked by the Department and DND to use procurement procedures different from those described in Articles 506(1) to (10) of the AIT apply to this procurement. Specifically, the Tribunal will determine whether the requirement to ensure compatibility with existing products, including the recognition of exclusive rights, such as exclusive licences, and/or the absence of competition for technical reasons, including a "no alternative or substitute" condition, created a situation such that only one supplier was able to meet the requirements of this procurement, thus allowing the Department to exercise its discretion under Article 506(12) of the AIT and to issue a contract on a sole-source basis to GasTOPS.

The Tribunal observes that, as stated in Article 501 of the AIT, the purpose of that chapter is, in part, to establish a framework that will ensure equal access to procurement for all Canadian suppliers. In this context, the Tribunal is of the view that the circumstances described in Article 506(12) of the AIT represent exceptions to the norm, which requires open tendering. For this reason, the Tribunal is of the view that the onus is on the Department to establish before the Tribunal the circumstances that it invoked to derogate from normal tendering procedures.

The Tribunal is not satisfied that the Department and DND have successfully established the circumstances of Articles 506(12)(a) and (b) of the AIT in this instance.

With respect to the compatibility of the WESCAM 12DS with the FSI FLIR 2000G, the Tribunal notes that DND's evaluation was based on insufficient and second-hand information. The Tribunal notes further that the evaluation was conducted after the decision not to allow Wescam to compete in this solicitation. Wescam was not given the opportunity to explain or demonstrate the WESCAM 12DS, even though it clearly indicated in its January 6, 1999, letter to the Department challenging the ACAN that the WESCAM 12DS was "plug compatible with the FSI 2000G and is available with a compatible mounting system." While not deciding whether the WESCAM 12DS is compatible with the FSI FLIR 2000G, the Tribunal finds that the Department and DND failed to establish adequately that these two systems are not compatible.

With respect to GasTOPS "exclusive licence," the Tribunal notes that the arrangement between FSI and GasTOPS does not prohibit DND from buying any other compatible FLIR systems from any other suppliers or, for that matter, refurbished FLIR 2000G systems from any other suppliers. In the Tribunal's opinion, the only limitation on DND arising from this licence agreement is that, if DND wants to procure a new FLIR 2000G system (FSI does not manufacture the system anymore), it will have to do so through GasTOPS, "FSI's designated agent in Canada for the Canadian Forces FLIR 2000G thermal imaging systems."

With respect to the questions of ease of maintenance, including the existing repair and overhaul contract for FLIR systems, the training and other logistic requirements, and the age and configuration of the designated platform (i.e. Sea King aircraft) on which the refurbished FLIR systems are to be mounted, the Tribunal is of the opinion that these considerations are real and should not be ignored in conducting a procurement. There certainly are ways, however, to factor them into a competitive solicitation. More importantly, such considerations which essentially are cost based cannot, by themselves, support a case for lack of product compatibility and the use of limited tendering procedures. In this instance, the Tribunal notes the significant price differential suggested by Wescam which, if accurate, could go a long way towards paying for transition costs to be incurred by Wescam in proposing an alternate competitive product.

With respect to Article 506(12)(b) of the AIT, the Tribunal finds that the Department has not established that, for technical reasons, no alternative to or substitute for the FLIR 2000G system exists. In the Tribunal's opinion, the evidence on the record suggests that DND, having been informed by FSI that six refurbished FLIR systems were available for sale "on a first come, first served basis," decided to buy the systems without properly considering whether these additional systems really were needed at this time and what steps had to be followed for the procurement. It is worth noting, in this regard, DND's statement that it "would cancel its requirement rather than introduce different FLIR systems." The Department and DND then published an ACAN, summarily disposed of a serious challenge to the ACAN made by Wescam and

proceeded to award a contract to the intended supplier (GasTOPS) within a very short time frame, without any urgent reasons and at a unit price now seriously put into question by Wescam. In the Tribunal's opinion, the Department and DND not only failed to reasonably establish that competition was not possible in this instance but never seriously considered that option, since it simply was not convenient, as evidenced by DND's responsible official stating: "It should be clearly explained to WESCAM that the Sea King Community does not want to introduce a new FLIR system to its inventory.... The introduction of a new system would create significant logistic problems."

Articles 514(2) and (3) of the AIT provide, in part, that:

2. In order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain bid protest procedures for procurement covered by this Chapter that:
 - (f) require the reviewing authority to provide its findings and recommendations in writing and in a timely manner and make them available to the Parties;
3. The reviewing authority may:
 - (a) recommend, where appropriate, a delay in awarding a proposed contract pending the resolution of the bid protest;
 - (b) issue a recommendation to resolve the bid protest, which may include directing the entity to re-evaluate offers or terminate or re-compete the contract in question.

The above rights have been implemented through the CITT Act, which specifically provides, under subsections 30.13(3) and (4), that the Tribunal may order the postponement of a contract award subject only to the urgency and national interest override provisions. As well, subsection 30.15(2) of the CITT Act provides that the Tribunal may recommend various remedies, including "(e) that the complainant be compensated by an amount specified by the Tribunal."

In deciding the appropriate remedy, the Tribunal must consider, *inter alia*, the prejudice to Wescam, the good faith of the parties and the extent to which the contract has been performed.

The Tribunal notes that, despite Wescam's serious grounds of objection, a contract was awarded to GasTOPS on January 20, 1999, effectively preventing the Tribunal from exercising its postponement of award order power and, thus, frustrating Wescam's access to a wide range of remedies. Considering that DND would rather cancel the solicitation than introduce a different FLIR system for the Sea King aircraft, the Tribunal has difficulty understanding why it was necessary to proceed so expeditiously in the matter. In the circumstances, the Tribunal's preferred remedy would have been to recommend that the contract with GasTOPS be terminated and, if the need still existed, that a competitive solicitation be conducted for this requirement. However, the Tribunal, mindful that the contract for this procurement is in all likelihood substantially performed, has to consider other alternatives.

The Tribunal can recommend that the Government compensate Wescam for the opportunity that it lost had the procurement been conducted on a competitive basis, as it should have been. By not being allowed to bid, Wescam clearly lost an opportunity to be awarded the contract and to profit therefrom. It is not clear, however, how many other potential suppliers might have been interested by the solicitation and might have decided to present proposals. Nor is it clear how Wescam's bid would have fared, i.e. whether it would have presented the lowest compliant bid. In these circumstances, it is difficult to establish, with any certainty, the amount of compensation to be awarded to Wescam. Given the nature of the goods procured, the amount of profit that reasonably could have been expected is approximately 10 percent of the total value

of the contract awarded, excluding GST. The Tribunal does not believe that it would be appropriate to award damages of that magnitude in this case. Because of the uncertainty with respect to the likely number of bidders, in determining the proper amount, the Tribunal is guided by the principles behind the compensation paid in Board File No. G92PRF66W-021-0031.¹¹

The value of the contract awarded to GasTOPS is \$962,178.24, including GST.¹² Wescam submitted that it could have bid a compatible product at some \$48,000 less per unit than the price quoted by GasTOPS. Taking this into consideration, the Tribunal establishes the value of such a contract at \$611,232, excluding GST. The Tribunal notes that Wescam, in its submissions, indicated that used and refurbished FLIR 2000G systems are available from suppliers other than GasTOPS in both Canada and the United States. On this basis, in the Tribunal's opinion, it is reasonable to assess Wescam's chances of being successful in this solicitation and to profit therefrom at 1 in 4. In light of the above, the Tribunal fixes the amount of the compensation at \$15,000.

The Tribunal has noted serious deficiencies in the manner in which this procurement was handled. There are grave doubts as to whether DND acted in good faith when it refused to consider Wescam's products as acceptable alternatives. In the Tribunal's opinion, there is no question that the integrity and efficiency of the procurement system was prejudiced to a certain degree. In light of these facts, the Tribunal, in addition to recommending that DND conduct future procurement for FLIR systems in accordance with the provisions of the applicable trade agreements, recommends that the Government compensate Wescam by an amount of \$15,000 for being deprived of the opportunity to bid on this solicitation, to possibly be awarded the contract and to profit therefrom.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements set out in the AIT and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that any future procurement for FLIR systems for the Department, including that relating to the Sea King aircraft, be conducted in accordance with the provisions of the applicable trade agreements.

The Tribunal further recommends that the Government compensate Wescam in the amount of \$15,000 for being deprived of the opportunity to compete for this procurement and to possibly profit therefrom.

11. Procurement Review Board, *Nicolet Instrument Canada Inc.*, January 13, 1993. In establishing the compensation to be paid in *Nicolet*, the Procurement Review Board considered that the complainant's bid had a one in five chance of being successful, given that five suppliers had manifested their interest in a previous related procurement action. On that basis, the Procurement Review Board recommended that the complainant be paid compensation equal to 1/5 of the profit that it would have made had the contract been awarded to it at the price stated in its complaint.

12. The value of the contract awarded, excluding GST, is \$899,232.

Pursuant to section 30.16 of the CITT Act, the Tribunal awards Wescam its reasonable costs incurred in relation to filing and proceeding with the complaint.

Anita Szlajak
Anita Szlajak
Presiding Member