



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2011-034

DEW Engineering and  
Development ULC

*Decision made  
Tuesday, October 4, 2011*

*Decision and reasons issued  
Friday, October 7, 2011*

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**

**DEW ENGINEERING AND DEVELOPMENT ULC**

**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.

Stephen A. Leach  
Stephen A. Leach  
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 complaint relates to a procurement (Solicitation No. W8486-087634/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for materiel and services relating to the inspection, repair and replacement of in-service armour for tracked light armoured vehicles.

3. DEW Engineering and Development ULC (DEW) alleged that PWGSC failed to follow the evaluation procedures provided in the Request for Proposal (RFP). Specifically, DEW alleged that PWGSC imposed new, subjective criteria in the middle of the bid evaluation process that are likely to unfairly eliminate it from the competition.

4. On June 15, 2011, PWGSC issued an RFP with a due date for the receipt of bids of August 10, 2011, which was subsequently amended to September 7, 2011. Among other requirements, the Qualification Test Procedure (QTP) required that bidders manufacture, as witnessed by DND representatives, two qualification test panels that met the requirements of the technical data package (TDP) and then have those test panels successfully shot tested by DND.<sup>3</sup>

5. DEW submitted that it manufactured the two test panels on July 12 and 13, 2011, under the observation of DND representatives. DEW submitted that the representatives identified no deficiencies with the test panels at that time. Subsequently, DEW sent the test panels to a DND facility for shot testing, which took place on September 7, 2011.

6. According to DEW, on September 7, 2011, but prior to the shot testing, PWGSC informed DEW that its test panels did not meet certain quality standards and that PWGSC had decided not to have them shot tested. DEW submitted that PWGSC claimed that three physical characteristics of the samples did not meet certain quality standards. Specifically, PWGSC claimed that the test panels were not sufficiently flat, were too thick and showed delamination. DEW claims that it challenged PWGSC on these issues as, according to DEW, these were not requirements of the RFP. DEW further submitted that, in response, PWGSC could not identify any objective criteria regarding thickness or flatness and subsequently withdrew its objection regarding flatness. DEW also submitted that, with respect to thickness, PWGSC had not measured the test panels using the proper instrument and that PWGSC had only measured a portion of the test panels from a zone which, as acknowledged in the testing procedure, does not represent the ballistic properties of the test panels.

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

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

3. The Tribunal notes that portions of the TDP were designated as classified and included a passage identified as being "classified Level II - Secret". DEW advised the Tribunal that there was some confusion on the company's part as to whether, as part of its complaint, it could provide the Tribunal with the QTP, as it was included with the classified portion of the TDP. While the Tribunal has been able to resolve the current complaint without the QTP, any future complaint would need to include all information and documents relevant to the complaint that are in the complainant's possession. Since DEW stated that the QTP is central to its complaint, the Tribunal would require that document.

7. DEW submitted that, after it challenged PWGSC regarding all three of the alleged deficiencies, PWGSC requested a one-and-a-half-hour recess, after which it proceeded with the shot testing of DEW's test panels. According to the complaint, PWGSC advised DEW that it was proceeding with the testing "despite [its] misgivings", that it would be collecting the "bits and pieces" of the panels after the shot testing and that it might subject them to further analysis. On September 13, 2011, PWGSC advised DEW that it would be submitting all test panels to DND's Quality Engineering Test Establishment (QETE) for further testing.

8. Also on September 13, 2011, DEW informed PWGSC that it believed that PWGSC had introduced four irregularities into the evaluation process: (1) the introduction of an unscheduled and unspecified inspection performed after the completion of the supervised production of the test panels and the shot testing; (2) the application of three new subjective performance standards (flatness, thickness and delamination) not included in the solicitation; (3) the attempt to reject DEW's test panels on the basis of these allegedly subjective characteristics; and (4) the intent to introduce further testing by QETE, after the initial shot-test, to standards not specified in the RFP. DEW also provided a summary of the events regarding the shot testing that took place on September 7, 2011.

9. PWGSC replied on September 16, 2011. It stated that DEW's letter dated September 13, 2011, contained "... numerous errors and misrepresentations that will not be addressed at this time, but will be the subject of future correspondence". PWGSC's letter confirmed that both DND and PWGSC employees were of the opinion that DEW's test panels were defective for the following reasons: (1) they exhibited delamination in contravention of one of the specifications incorporated into the RFP; (2) they exhibited non-compliant thickness; and (3) there were "... other quality concerns ...". PWGSC further stated that the decision had been made to proceed with the test firing because it had no intention of ever unfairly disqualifying any bidder. PWGSC also confirmed that the QETE testing would proceed to determine the next steps in the procurement process.

10. DEW responded on September 28, 2011, by reiterating its position that its test panels met all the technical requirements of the solicitation and stating that the evaluation plan specified in the RFP did not include any analysis after the shot testing. Therefore, according to DEW, the QETE analysis could have no bearing on the evaluation. It further advised that it was proceeding with other avenues of redress.

11. On September 30, 2011, the Tribunal received DEW's complaint. The grounds of complaint mirrored those found in DEW's correspondence with PWGSC dated September 13, 2011, namely, that PWGSC improperly (1) introduced an unscheduled and unspecified inspection performed after the completion of the supervised production of the test panels and the shot testing, (2) applied three new subjective performance standards (flatness, thickness and delamination) not included in the solicitation, (3) attempted to prejudicially reject DEW's test panels on the basis of these allegedly subjective characteristics and (4) introduced unlawful testing by QETE after the shot testing.

12. The Tribunal considers that the grounds of complaint are speculative, as there is not yet any indication that PWGSC has rejected DEW's proposal. The Tribunal notes the statement made by PWGSC on September 16, 2011, to the effect that PWGSC has no intention of unfairly disqualifying any bidder. Until such time as DEW's proposal is rejected and DEW considers that the reasons for its rejection, if such a rejection occurs, are contrary to any applicable trade agreement, DEW's claims are premature.

13. This decision does not preclude DEW from filing a new complaint if DEW believes that PWGSC rejects its bid in a manner that violates an applicable trade agreement. In the event that DEW does file a new complaint, it must do so within the time limits specified in the *Regulations* and comply with subsection 30.11(2) of the *CITT Act*.

#### **DECISION**

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

Stephen A. Leach  
Stephen A. Leach  
Presiding Member