



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-010

Thales Canada Inc.

*Decision made
Friday, July 27, 2012*

*Decision issued
Tuesday, July 31, 2012*

*Reasons issued
Thursday, August 2, 2012*

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

THALES 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.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a procurement (Solicitation No. W8476-112965/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of an integrated soldier system.

3. Thales Canada Inc. (Thales), through its division Thales Canada Defence and Security, alleged that PWGSC improperly disqualified its proposal on the basis that it did not comply with the mandatory security requirements of the solicitation.

4. The contentious portion of the Request for Proposal (RFP) provides as follows:

6.1.4.1 In order to submit a bid the Bidder must provide with their Section I General Bid (See RFP clause 7 to Annex AA to Volume 1), proof that the following conditions are met:

...

(c) the Bidder's proposed individuals requiring, for the purpose of executing the Acquisition Contract Phase A (Qualification), access to accountable COMSEC material, classified or protected information, assets or sensitive work site(s) must meet the security requirement as indicated in RFP article 3 to Volumes 2 and 3 Resulting Contract Clauses.

...

6.1.4.2 The Bidder must provide to the Contracting Authority via email, by 02:00 PM Eastern Standard Time, on November 30, 2012, proof that they hold an approved COMSEC account that satisfies the security requirements indicated in RFP article 3 to Volume 2 and 3 Resulting Contract Clauses.

5. Article 3 to Volumes 2 and 3 of the RFP provides as follows:

3.2 The Contractor personnel requiring access to **PROTECTED/CLASSIFIED (NON-RESTRICTED)** information, assets or sensitive work site(s) must each hold a valid personnel security screening at the level of **SECRET**, granted or approved by the CISD, PWGSC. ...

3.3 The Contractor personnel requiring access to **PROTECTED/CLASSIFIED (RESTRICTED)** information, assets or sensitive work site(s) **must** ... **EACH** hold a valid personnel security screening at the level of **SECRET**, granted or approved by the CISD, PWGSC. ...

...

3.6 The Contractor personnel requiring access to **COMSEC** information/assets **must be a Canadian citizen**, hold a valid security clearance commensurate with the information/assets that will be accessed, have a need-to-know and have undergone a **COMSEC** briefing and signed a **COMSEC** Briefing certificate. ...

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

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

6. Clause 7 of Annex AA to Volume 1 of the RFP provides as follows:

7.1. Security requirements

The information requested in the RFP article 6.1 to Volume 1 must be provided in the Bidders proposal Section I.

7. The chronology of events that led to the filing of this complaint is summarized in the following paragraphs.

8. On June 11, 2012, which was the bid closing date, Thales submitted its proposal. In its proposal, Thales put forward the names of three individuals who would require, for the purpose of executing the “Acquisition Contract Phase A (Qualification)”, access to accountable COMSEC material, classified or protected information, assets or sensitive work site(s).

9. On July 13, 2012, for the purpose of verifying that the three proposed individuals each held a valid security clearance, a PWGSC officer asked Thales to provide the CISD with the security clearance reference numbers for each of the individuals.

10. Thales supplied the reference numbers for two of the individuals, but stated that the third individual did not in fact have the security clearance. Thales also stated that this individual would not require access to COMSEC material or to classified or protected information or assets, and that his name was included in error. Thales asked PWGSC to remove the individual’s name from the list.

11. Later in the day, the PWGSC officer informed Thales that its bid had been rejected.

12. On July 16, 2012, the PWGSC officer explained that Thales’ bid was rejected because Thales’ request of July 13, 2012, to remove the third individual’s name from the list constituted “bid repair”.

13. On July 23, 2012, Thales received a formal written notice from PWGSC stating that the bid had been rejected because one of the proposed individuals did not meet the security requirements of the RFP.

14. Thales takes the position that PWGSC misapplied or misinterpreted the mandatory requirements, applied undisclosed evaluation criteria and otherwise acted unreasonably in breach of the applicable trade agreements.

15. Article 506(6) of the *Agreement on Internal Trade*³ requires that tender documents “... clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.” The other trade agreements have a similar obligation.

16. When responding to a solicitation, the onus is on the bidder to demonstrate that it meets all the mandatory requirements of the procurement.⁴ When evaluating a bid, it is the duty of the procuring authority to ensure that the bid thoroughly and strictly complies with the mandatory requirements identified in the solicitation.⁵

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

4. *Re Complaint Filed by Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Re Complaint Filed by Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

5. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA). Citing *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111, Thales argued that the standard is substantial compliance, but the common law standard does not apply to the applicable trade agreements.

17. Furthermore, while the procuring authority may request clarification of some existing aspect of a bid, after bid closing, it cannot accept any information that is tantamount to a substantive revision or modification of the proposal.⁶ For example, information in respect of a mandatory requirement that is submitted during a clarification process that is different from that which appeared in the proposal constitutes a revision that is substantive in nature.⁷

18. In the course of conducting its due diligence on the bid at issue after bid closing, PWGSC learned from Thales that one of the proposed individuals did not in fact have the mandatory security clearance referred to in article 6.1.4 to Volume 1 and article 3 to Volumes 2 and 3 of the RFP.

19. It is clear on the face of the RFP that this information was required at the time of bidding. Article 6.1.4.1 to Volume 1 begins with the following words: “In order to submit a bid the Bidder must provide with their Section I General Bid (See RFP clause 7 to Annex AA to Volume 1), proof that the following conditions are met” Clause 7 of Annex AA to Volume 1 provides as follows: “The information requested in the RFP article 6.1 to Volume 1 must be provided in the Bidders proposal Section I.”

20. Article 6.1.4.2 to Volume 1 of the RFP is different. It allows bidders to provide information after bid closing—up to November 30, 2012. However, that article deals unambiguously with the bidder’s own “COMSEC account”. It does not apply to the personal security clearances of the proposed individuals themselves, which, as indicated in Article 3 to Volumes 2 and 3, concern access to accountable COMSEC material, as well as to classified/protected information, assets or sensitive work site(s).

21. By Thales’ own admission, one of the proposed individuals did not have such a clearance at bid closing.

22. Consequently, by declaring the bid non-compliant with the security requirements of the RFP, PWGSC acted consistently with Article 506(6) of the *AIT*.

23. Had PWGSC acquiesced in Thales request to remove the individual’s name from the bid, the result would have been a revision to the bid that was substantive in nature; it would have turned an otherwise non-compliant proposal into one that was compliant. That course of action would have been inconsistent with Article 506(6) of the *AIT*.

24. The Tribunal recognizes that it was not a mandatory requirement of the RFP that a minimum number of individuals with the security clearance be proposed and that, therefore, if Thales had only proposed the two individuals with the requisite security clearance, it would have complied with the security requirements in the RFP. However, Thales chose to propose three individuals, one of whom did not have the requisite security clearance, and it is by reason of this fact that the Tribunal cannot but find that a mandatory requirement of the RFP was not met at bid closing and that, therefore, the evidence does not reasonably disclose that PWGSC improperly disqualified Thales’ proposal.

6. *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT); *Re Complaint Filed by Bell Canada* (26 September 2011), PR-2011-031 (CITT).

7. *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT).

DECISION

25. 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