



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2012-028

Teledyne DALSA Inc.

*Decision made  
Thursday, November 29, 2012*

*Decision issued  
Friday, November 30, 2012*

*Reasons issued  
Wednesday, December 12, 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**

**TELEDYNE DALSA 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

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*<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. W7701-125353/A) by the Department of Public Works and Government Services (PWGSC) on behalf of Defence Research and Development Canada (DRDC) - Valcartier, an agency of the Department of National Defence, for the development of a compact, helmet-mounted, ruggedized short-wave infrared (SWIR) camera with an illuminator, built around an indium gallium arsenide focal plane array.

3. Teledyne DALSA Inc. (Teledyne) alleged that PWGSC arbitrarily and unfairly disqualified its proposal. It also alleged that PWGSC failed to exercise due diligence by not requesting that Teledyne further clarify its position with respect to intellectual property rights prior to disqualifying its proposal.

4. On July 31, 2012, PWGSC issued a Request for Proposal (RFP) for the development of the aforementioned SWIR camera.

5. Article 2.1 of Part 4 of the RFP, “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, provides as follows:

1. To be declared responsive, a bid must:
  - (a) comply with all the requirements of the bid solicitation;
  - ...
2. Bids not meeting (a) or (b) or (c) will be declared non-responsive.

6. Annex A to the RFP, “**STATEMENT OF WORK**”, which describes the services required by DRDC, identified the following in terms of reports and other deliverables:

- Complete schematics of all electronic circuits present in the camera (after 6 months).
- ...
- Complete technical drawings of the camera in paper and electronic format (after 24 months).
- Complete description (supplier, part number, technical specifications) of all components of the camera (after 24 months).
- Source code of all software developed (after 24 months).

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

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

7. On September 28, 2012, bids closed. Teledyne submitted a proposal in response to the solicitation. The proposal contained the following statements in respect of reports and deliverables:

### 6.3.3 Software Components

Full feature complete SWIR Helmet-mounted Camera as per RFP SOW specification requirements.

**Disclosure** – the software or/and firmware for functional SWIR Helmet-mounted Camera operation is the property of the integrated development team and as such will not be provided as part of the deliverables, while user manual will provide all necessary details of its functional and interfacing details. If any amendments or/and future additions will be necessary by the user, as well as any warranty and maintenance/repair support the integrated development team, in face of [Teledyne], will provide, while considering on option of escrow agreement if such support is not future feasible.

...

### 6.3.6 Reports

...

- c) Complete schematics of all electronic circuits within the camera – Disclaimer: All design details including schematics and Bill of Materials as well as supplier base and software/firmware is a property of the integrated development team (partner companies), while such information will not be supplied to DRDC/Crown, as it will be offered to provide such information only on a basis of inability to provide or support such product as escrow agreement.

...

- g) Complete technical drawings of the SWIR Helmet-mount Camera – only outline and interface dimensions of the camera will be provided as per disclaimer in (c) above.
- h) Complete description of all the SWIR Helmet-mount Camera components – see disclaimer in (c).
- i) Source code for the SWIR Helmet-mount Camera – see disclaimer in (c).

8. In a letter dated November 8, 2012, PWGSC advised Teledyne that its proposal had been declared non-responsive, as it did not comply with all the mandatory requirements of the solicitation. In this regard, it made reference to sections 6.3.3 and 6.3.6c) of Teledyne's proposal. PWGSC further advised that a contract had been awarded to another bidder, whose proposal had met all the mandatory requirements of the solicitation.

9. According to the complaint, Teledyne made an objection to PWGSC by telephone and e-mail on November 16, 2012. In the e-mail, Teledyne stated that it believed that its proposal had been inadvertently misinterpreted as non-compliant and that the essence of the misunderstanding was related to the complex issue of intellectual property and data rights. It suggested that a round-table discussion could resolve the issue to the parties' mutual advantage.

10. According to the complaint, on November 21, 2012, a debriefing by way of teleconference was held between Teledyne and PWGSC, during which PWGSC denied Teledyne's request to reconsider its proposal.

11. On November 23, 2012, Teledyne filed its complaint with the Tribunal.

12. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>3</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>4</sup> the *Agreement on Government Procurement*,<sup>5</sup> Chapter *Kbis* of the *Canada-Chile Free Trade Agreement*,<sup>6</sup> Chapter Fourteen of the *Canada-Peru Free Trade Agreement*<sup>7</sup> or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*<sup>8</sup> applies. In this case, only the *AIT* applies.<sup>9</sup>

13. Article 506(6) of the *AIT* provides that “[t]he tender documents shall 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.”

14. In the Tribunal’s view, Annex A of the RFP clearly identified certain items, such a technical drawings, descriptions, schematics and the source code of all software developed for the SWIR camera, as required deliverables. There is no indication that bidders could include statements in their proposals implying that the proposals were conditional on the modification of these requirements or that these requirements could be the subject of negotiations after contract award. As such, bidders could not state that they would retain some of the intellectual property rights associated with the deliverables.

15. Indeed, sections 3 and 4 of clause K3410C (2008-12-12), “Canada to Own Intellectual Property Rights in Foreground Information”, which was incorporated by reference at article 2.2 of Part 7 of the RFP, “**RESULTING CONTRACT CLAUSES**”, made it very clear that rights to all intellectual property developed or created as part of the work would belong to the Government and, more importantly, that the Government would be granted a non-exclusive, perpetual, irrevocable, worldwide, fully paid and royalty-free licence to use, disclose or reproduce all previously existing intellectual property that is incorporated into the work.

16. In the Tribunal’s view, Teledyne’s proposal and complaint both unambiguously and positively stated that certain previously existing intellectual property that would be incorporated into the SWIR camera would *not* be provided as part of the deliverables. The Tribunal notes that section 1 of the

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3. *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).

4. 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].

5. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)>.

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997). Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

9. The services being requested are either specifically excluded from, or not included in, the coverage of the other trade agreements.

“2003 (2012-06-11) Standard Instructions - Goods or Services - Competitive Requirements”, which was incorporated by reference at article 1 of Part 2 of the RFP, “**BIDDER INSTRUCTIONS**”, provides that “... bidders must ... c) submit bids and enter into contracts only if they will fulfill all obligations of the Contract.” Under these circumstances, the Tribunal finds that it was reasonable for PWGSC to declare Teledyne’s proposal non-responsive.

17. In previous decisions, the Tribunal has made it clear that bidders bear the onus to seek clarification before submitting an offer.<sup>10</sup> Consequently, if Teledyne had any concerns with the requirements as they pertained to the deliverables, or had any reason to believe that its interpretation of the requirements differed from that of PWGSC, it should have raised this as an issue or sought clarification from PWGSC before it submitted its proposal. For them to unilaterally decide and state that at least part of the requirements would not be met, equates to affirming that they either cannot or do not intend to meet those requirements.

18. With respect to Teledyne’s assertion that PWGSC should have requested that it clarify its position with respect to intellectual property rights before disqualifying its proposal, the Tribunal notes that, although a procuring entity can, in some circumstances, seek clarification on a particular aspect of a proposal, it is not under any duty to do so.<sup>11</sup> Moreover, it is important to establish a distinction between, on the one hand, a “clarification” and, on the other hand, a substantive “revision” or modification to a proposal.<sup>12</sup>

19. In this case, the Tribunal is of the view that allowing Teledyne to remove the disclaimers relating to intellectual property rights from its proposal after the bid closing date would have constituted a substantive revision of its proposal and, therefore, would not have been permitted.

20. The Tribunal notes that it is readily apparent from statements made in Teledyne’s complaint that it considered the use of its existing intellectual property as a means to deliver the best value to the Government (i.e. to reduce the total cost). It is therefore reasonable to assume that, had Teledyne been allowed to remove the disclaimers relating to intellectual property rights from its proposal in order to comply with the stated requirements, it would probably have had to increase its bid price, which would have also been considered a substantive revision of its proposal.

21. Accordingly, the Tribunal finds that the information provided by Teledyne does not disclose a reasonable indication that the procurement has not been conducted in accordance with the *AIT*. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

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10. See, for example, *Re Complaint Filed by Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT).

11. See *Re Complaint Filed by IBM Canada Limited, PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University* (10 April 2003), PR-2002-040 (CITT) at 15-16; *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

12. See *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT) at 8-9; *Re Complaint Filed by DDI Group Ltd.* (24 November 2008), PR-2008-036 (CITT) at para. 12.

**DECISION**

22. 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