



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2022-021

Telecore

*Decision made  
Tuesday, June 28, 2022*

*Decision and reasons issued  
Friday, July 8, 2022*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

**BY**

**TELECORE**

**AGAINST**

**THE DEPARTMENT OF NATIONAL DEFENCE**

**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.

Peter Burn

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Peter Burn

Presiding Member

## STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (Regulations), a potential supplier may file a complaint with the Canadian International Trade 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.

### SUMMARY OF THE COMPLAINT

[2] This complaint was filed by Telecore with respect to a request for proposal (RFP) (solicitation W8485-237137) issued by the Department of National Defence (DND) for the supply of headsets for C130J (headsets).

[3] In its complaint, Telecore relies on various articles of the Canadian Free Trade Agreement (CFTA)<sup>3</sup> and raises the following:

- (i) Telecore complains about the time period allotted for submitting its bid. It argues, in essence, that the bidding period “was extremely short”, that DND closed the bid “in an inordinately short time period” and that its extension request was disregarded.<sup>4</sup>
- (ii) Telecore argues that DND failed to provide sufficient technical specification details regarding the headsets.<sup>5</sup> More specifically, it argues that DND failed to provide “the necessary wiring diagram”<sup>6</sup> or “wiring schematic”<sup>7</sup> as well as “all materials relevant to fit, form, function and specifications to interchangeability”.<sup>8</sup>
- (iii) Telecore appears to argue that DND created obstacles to trade and failed to adhere to a fair acquisition process that guaranteed competition, transparency, and impartiality.<sup>9</sup> Telecore appears to argue further that the equivalent conditions provided under the RFP are demonstrative of “restrictive tender bias”<sup>10</sup> toward DND’s preferred manufacturer, “especially where no respective [preferred manufacturer] specifications were provided.”<sup>11</sup>

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>2</sup> SOR/93-602.

<sup>3</sup> In its complaint, Telecore cites articles 403, 404, 406, 501, 506, 515, 603, 604, and 605 of the CFTA. Exhibit PR-2022-021-01 at 11.

<sup>4</sup> Exhibit PR-2022-021-01 at 7, 11.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 11.

<sup>7</sup> Exhibit PR-2022-021-01.A at 44.

<sup>8</sup> *Ibid.*

<sup>9</sup> Exhibit PR-2022-021-01 at 11.

<sup>10</sup> *Ibid.* at 24.

<sup>11</sup> *Ibid.*

[4] As a remedy, Telecore requests that a new solicitation be issued or that it be compensated for lost profits or opportunity.<sup>12</sup> Telecore also seeks reimbursement of its bid preparation costs and complaint costs.<sup>13</sup>

[5] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into the complaint.

## BACKGROUND

[6] On May 26, 2022, DND issued and published the RFP in question on Buyandsell.gc.ca, with an initial bid closing date of June 10, 2022, at 2:00 p.m. EDT.<sup>14</sup>

[7] On June 6, 2022, a first amendment to the solicitation was published by DND to respond to a question from a potential bidder, to modify requirements provided under the RFP so as to allow equivalent products to be proposed, and to extend the closing date to June 17, 2022, at 2:00 p.m. EDT.<sup>15</sup>

[8] On June 9 and 10, 2022, Telecore sent emails to DND requesting to obtain the headsets' "technical data package . . . for build of an equivalent product".<sup>16</sup>

[9] On June 12, 2022, in response to Telecore's request, DND replied that the required information would be posted by way of amendment on Buyandsell.gc.ca and that it would be informed of when it was published.<sup>17</sup>

[10] On June 14, 2022, Telecore further inquired with DND as to whether the solicitation's closing date was going to be extended.<sup>18</sup>

[11] On June 15, 2022, DND published a second amendment, which included the requested headsets' technical specifications,<sup>19</sup> and informed Telecore accordingly by email.<sup>20</sup> As for Telecore's question pertaining to a possible extension of the solicitation closing date, DND provided the following response:<sup>21</sup>

In terms of extending the tender, Canada, at its discretion *could* increase the bid closing by one week only. If this is a deadline you can meet, *please let me know as soon as possible so an additional amendment can be created.*

[Emphasis added]

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<sup>12</sup> *Ibid.* at 7, 11.

<sup>13</sup> *Ibid.* at 9.

<sup>14</sup> See the description on Buyandsell.gc.ca, online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-22-00996585>>.

<sup>15</sup> *Ibid.* Exhibit PR-2022-021-01 at 12–13; Exhibit PR-2022-021-01.A at 14. As a result of this amendment, clause B3000T titled "Equivalent Products" from the *Standard Acquisition Clauses and Conditions Manual*, which set out the conditions upon which equivalent products could be considered, was incorporated by reference under section 2.12 of the RFP.

<sup>16</sup> Exhibit PR-2022-021-01 at 17–18.

<sup>17</sup> *Ibid.* at 19.

<sup>18</sup> *Ibid.*

<sup>19</sup> Exhibit PR-2022-021-01.A at 32.

<sup>20</sup> Exhibit PR-2022-021-01 at 20.

<sup>21</sup> *Ibid.*

[12] On June 16, 2022, in its response to DND, Telecore mentioned that the technical specifications were forwarded to its engineering department and that it hoped to receive an answer by the beginning of the next week. In this regard, Telecore stated the following in its response:<sup>22</sup>

If the engineering department requires more time, they will hopefully advise as to how much more. If more time is required than the suggested extension of one week, I will respectively contact, as these specifications should have been in[i]tially included, with allotted time per Treasury Board policy.

[13] On June 17, 2022, approximately two hours after the solicitation closing date and time, Telecore sent a first email to DND at 4:21 p.m. in which it stated that the “engineers have requested a wiring schematic”.<sup>23</sup> A second email was sent to DND a few minutes later, at 4:24 p.m., in which Telecore formally requested an extension to the solicitation period as follows:<sup>24</sup>

As well we would require an extra week at a minimum. Should more time be required I will acknowledge by Tuesday.

[14] On June 20, 2022, DND responded to Telecore as follows:<sup>25</sup>

I apologize but the tender closed at 2 p.m. on this past Friday afternoon (June 17th) as scheduled. *Since I had not heard from you prior to the closing*, the tender was not extended and is now closed for bidding. *This was an urgent requirement for Canada* and we needed to proceed as soon as possible.

[Emphasis added]

[15] On or around that same day, Telecore advised DND that it would be filing a grievance before the Tribunal.<sup>26</sup>

[16] On June 23, 2022, Telecore filed its complaint to the Tribunal.<sup>27</sup>

[17] On June 24, 2022, the Tribunal requested additional information for the complaint to be considered complete, in accordance with subsection 30.11(2) of the CITT Act.<sup>28</sup> On that same day, Telecore submitted the requested information. As a result, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on June 24, 2022.

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<sup>22</sup> *Ibid.* at 20–21.

<sup>23</sup> *Ibid.* at 21.

<sup>24</sup> *Ibid.* at 21–22.

<sup>25</sup> *Ibid.* at 22.

<sup>26</sup> *Ibid.* at 23.

<sup>27</sup> Although Telecore appears to have attempted, unsuccessfully, to submit its complaint to the Tribunal on June 20, 2022, it was not until June 23, 2022, that the complaint and supporting documents were received by the Tribunal. See Exhibit PR-2022-021-01 at 24–25.

<sup>28</sup> Exhibit PR-2022-021-02.

## ANALYSIS

[18] The Tribunal may not conduct an inquiry unless all prescribed conditions in respect of the complaint are met. Among such conditions, the Tribunal must determine whether the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.<sup>29</sup>

[19] For the Tribunal to inquire into a procurement complaint, there must be a reasonable indication that a procuring entity has violated one of Canada's trade agreements. The Tribunal has previously described the threshold as follows:

In procurement complaints, the party alleging that a procurement has not been conducted in accordance with the applicable trade agreements must provide some proof to support that claim. This is not to say that the complainant in a procurement dispute under one of the agreements has the burden of proving all necessary facts as a plaintiff generally does in a civil case . . . . However, the complainant must provide sufficient facts or arguments to demonstrate a reasonable indication that a breach of one of the trade agreements has taken place.<sup>30</sup>

[20] While paragraph 7(1)(c) of the Regulations does not impose a high threshold, a party challenging a procurement must provide some evidence in support of its claim. The Tribunal has consistently held that mere allegations that are unsupported by evidence are insufficient to establish a reasonable indication that the procurement process was conducted in breach of the trade agreements.<sup>31</sup>

[21] In the matter at hand, having considered the evidence placed in the record, the Tribunal finds that the information provided with the complaint does not disclose a reasonable indication of a breach of the relevant trade agreements.<sup>32</sup>

[22] First, it is clear to the Tribunal that Telecore knew or ought to have known, at the time when the amendment to the bid closing date was published, that the solicitation closed on June 17, 2022, at exactly 2:00 p.m. However, it failed to formally seek an extension of time prior to the bid closing date, despite being presented with the opportunity to do so.

[23] The Tribunal has no reason to believe that DND conducted the solicitation in a manner that did not guarantee fairness or that would have otherwise prejudiced or harmed the integrity of the procurement process. DND advised Telecore, on June 15, 2022, that it was willing to consider extending the bid closing date if Telecore advised "as soon as possible so [that] an additional

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<sup>29</sup> Paragraph 7(1)(c) of the Regulations.

<sup>30</sup> *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27, citing *K-Lor Contractors Services Ltd.* (23 November 2000), PR-2000-023 (CITT) at 6.

<sup>31</sup> *Hone People Development Consulting Corporation* (11 April 2022), PR-2021-085 (CITT) at para. 46; *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) at para. 25; *Talmack Industries Inc.* (20 November 2018), PR-2018-040 (CITT) at para. 13. See also *Manitex Lifiking ULC* (20 March 2013), PR-2012-049 (CITT) at para. 22; *Vesey's Seeds Limited, doing business as Club Car Atlantic* (19 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT); *Tyco Electronics Canada ULC* (24 March 2014), PR-2013-048 (CITT) at paras. 9–12.

<sup>32</sup> The solicitation description on [Buyandsell.gc.ca](https://buyandsell.gc.ca/procurement-data/tender-notice/PW-22-00996585), online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-22-00996585>>, indicates that the CFTA applies to this procurement.

amendment [could] be created.”<sup>33</sup> For reasons known only to itself, Telecore chose not to take advantage of DND’s willingness to accommodate and failed to respond to DND prior to the bid closing date and time. Indeed, it was only as of June 17, 2022, at 4:24 p.m.,<sup>34</sup> approximately two hours after the closing date and time of the solicitation, that Telecore formally requested an extension.

[24] In light of these circumstances, the Tribunal finds that Telecore was the author of its own misfortune through tardiness. It is worth noting that it is incumbent upon bidders to request an extension of time as soon as the need arises. In this regard, in *Cougar Aviation Limited*, the Tribunal stated the following:<sup>35</sup>

The Tribunal notes that bidders cannot reasonably expect that the Department will *automatically* extend the solicitation deadline every time a modification is introduced. Bidders are in a position to assess the full impact which modifications may have on their ability to submit responsive bids and the time required to do so and, therefore, are responsible, as the need arises, to ask for extensions to the solicitation period.

[Emphasis added]

[25] Moreover, the Tribunal further finds, for the reasons set out below, that Telecore’s complaint did not provide sufficient information to disclose a reasonable indication that a trade agreement was breached. In the Tribunal’s view, Telecore has not sufficiently explained or adequately supported its allegations.

[26] Although Telecore was presented with the opportunity to provide additional information or documents relevant to the complaint,<sup>36</sup> Telecore did not provide any arguments or evidence explaining why additional time for the bidding period was necessary or an appreciation as to what additional time was required to respond to the solicitation. Nevertheless, the Tribunal is of the view that the bidding period was reasonable in the circumstances at hand, as no evidence placed in the record would cause it to believe that the requirement of the solicitation was not urgent in nature.<sup>37</sup>

[27] Further, Telecore did not provide any arguments or evidence explaining why a “wiring diagram”, a “wiring schematic” or other “materials relevant to fit, form, function and specifications to interchangeability”, aside from those provided by DND, were necessary information that had to be made available to bidders to allow them to prepare and submit a bid for equivalent products. In this regard, the Tribunal has previously found that it is the complainant that bears the burden of demonstrating that it was not provided with the necessary information.<sup>38</sup> In the Tribunal’s view, the information provided by Telecore in its complaint, or the lack thereof, falls well short of meeting the burden.

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<sup>33</sup> Exhibit PR-2022-021-01 at 20.

<sup>34</sup> *Ibid.* at 21–22.

<sup>35</sup> *Cougar Aviation Limited* (7 June 1999), PR-98-040 (CITT), upheld by the Federal Court of Appeal in *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (FCA).

<sup>36</sup> Exhibit PR-2022-021-02 at 1.

<sup>37</sup> Exhibit PR-2022-021-01 at 22.

<sup>38</sup> *Siemens Enterprise Communications Inc., formerly Enterasys Networks of Canada Ltd.* (23 December 2010), PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058 (CITT) at para. 192. See also, for example, *1091847 Ontario Ltd. v. Shared Services Canada* (6 May 2021), PR-2020-070 (CITT) at paras. 94–102.

[28] Lastly, having reached the conclusions set out above, the Tribunal is not persuaded that the terms of the solicitation had the effect of creating unnecessary obstacles to trade, whether by limiting competition or preventing bidders from responding to the solicitation. The evidence in this regard is lacking. Furthermore, Telecore did not present any evidence that could substantiate its allegation that the terms of the solicitation, namely the conditions for proposing equivalent products, were structured in such a way that it would reasonably appear to have excluded potential bidders as a result of being restrictive or biased to a preferred manufacturer. As stated above, mere allegations are insufficient to substantiate a claim.

[29] For these reasons, the Tribunal finds that Telecore's complaint and the information contained therein do not disclose a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

## **DECISION**

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

Peter Burn

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Peter Burn

Presiding Member