



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-044

Valcom Consulting Group Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, July 9, 2014*

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IN THE MATTER OF a complaint filed by Valcom Consulting Group Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

VALCOM CONSULTING GROUP INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Valcom Consulting Group Inc. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,150. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey
Presiding Member

Randolph W. Heggart

Randolph W. Heggart
Acting Secretary

Tribunal Member: Jason W. Downey, Presiding Member

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STATEMENT OF REASONS

COMPLAINT

1. On March 7, 2014, Valcom Consulting Group Inc. (Valcom) 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 complaint concerned a procurement (Solicitation No. EN578-055605/E) by the Department of Public Works and Government Services Canada (PWGSC) for the provision of task-based informatics professional services (TBIPS) to all federal government departments and Crown corporations.
2. Valcom alleged that PWGSC improperly declared its bid non-responsive, resulting in its disqualification, on the basis that certain elements of Valcom's bid were not received electronically through PWGSC's Web-based e-Portal. Valcom claimed that an internal error or failure must have occurred within the e-Portal, which prevented the electronic component of its bid from being received by PWGSC.
3. As a remedy, Valcom requested that it be issued a supply arrangement (SA) for tiers 1 and 2, and a standing offer (SO) under the solicitation. Valcom did not request the reimbursement of its complaint costs or bid preparation costs.
4. On March 12, 2014, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On April 7, 2014, PWGSC filed the Government Institution Report (GIR). On April 17, 2014, Valcom filed its comments on the GIR.
5. On May 30, 2014, the Tribunal requested additional information from PWGSC for the purpose of clarifying two questions of fact, which PWGSC filed on June 6, 2014.³ The Tribunal gave Valcom the opportunity to comment on PWGSC's submission, but no comments were received.
6. Given that there was sufficient written information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

BACKGROUND TO THE COMPLAINT

7. On January 18, 2013, PWGSC issued a refresh notice for a procurement vehicle, which was published electronically on January 21, 2013. The refresh notice comprised a Request for a Supply Arrangement (RFSA) and a Request for a Standing Offer (RFSO) for the government-wide provision of TBIPS.⁴ Each bid could result in an SA, an SO or both.⁵ All existing TBIPS SA and/or SO holders, including Valcom, were required to re-apply under the 2013 refresh process but, in so doing, were permitted to "grandfather" (incorporate by way of reference) their qualifying data submitted under the last refresh with

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

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

3. As a result, pursuant to paragraph 12(c) of the *Regulations*, the Tribunal extended the issuance of its determination in respect of the complaint to 135 days after the filing of the complaint.

4. Solicitation No. EN578-055605/E was the third refresh solicitation for SAs and SOs for the provision of TBIPS, which was originally issued in 2007.

5. Exhibit PR-2013-044-01A, Appendix 1 at 7, Vol. 1.

an option to update their bids and apply for additional categories and/or tiers. In Valcom's case, it sought to update its bid from the previous TBIPS solicitation.

8. The solicitation documents included instructions to bidders on the manner for submitting bids. In particular, they required that certain elements of the bid be submitted electronically through the Data Collection Component (DCC) of the online Centralized Professional Services System (CPSS), PWGSC's Web-based e-Portal for professional services, whereas other specified elements had to be submitted to PWGSC's Bid Receiving Unit (BRU) in hard copy.⁶

9. According to the GIR, PWGSC had received a total of 381 bids in response to the solicitation at bid closing on April 5, 2013. It found that 360 of these bids were properly submitted, i.e. including both the electronic component and the hard copy component, whereas the remaining bids were incomplete. For five of the bids that were found to be deficient, including that of Valcom, PWGSC received the hard copy component prior to bid closing but could find no record of the electronic submission through the DCC.⁷

10. PWGSC decided not to disqualify Valcom's bid until the end of the evaluation period "[a]s a matter of prudence and caution . . ."⁸ Between August 13 and October 31, 2013, PWGSC requested that Valcom clarify or confirm various aspects of its bid in relation to its certifications, security clearance and board of directors. On August 14, 2014, Valcom responded to PWGSC with the requested information but asked PWGSC to explain why this information was being sought, given that it was already available in both the print and electronic copies of Valcom's bid submission.⁹ There is no evidence on the record that PWGSC responded to Valcom's request for such an explanation.

11. On October 22, 2013, PWGSC requested a bid validity extension, to January 20, 2014, from all bidders, to which Valcom agreed.

12. On December 17, 2013, PWGSC notified Valcom in writing that its bid was non-responsive because the required electronic component had not been received through the DCC and, therefore, that its bid was disqualified in its entirety.¹⁰ PWGSC invited Valcom to submit further questions in writing.

13. According to the GIR, PWGSC determined that 12 of the 360 bids submitted in the correct format (i.e. with both hard copy and electronic components) were non-compliant with various other requirements of the solicitation. As a result, the remaining 348 bidders were awarded SAs, SOs or both.¹¹

14. On December 20, 2013, Valcom wrote to PWGSC objecting to the disqualification of its bid, alleging that it did in fact submit the required electronic component through the DCC on April 4, 2013, one day prior to bid closing. Valcom requested that its bid be re-instated and that PWGSC investigate the accuracy and integrity of the DCC.

15. On January 3, 2014, Valcom filed a complaint¹² with the Tribunal. Since there was no evidence of a response from PWGSC to Valcom's objection of December 20, 2013, the Tribunal found that the complaint was premature and, therefore, it was not accepted for inquiry.

6. *Ibid.* at 14.

7. Exhibit PR-2013-044-12 at 3, 21, Vol. 1D.

8. *Ibid.* at 14.

9. Exhibit PR-2013-044-01A, Appendix 2, Vol. 1.

10. *Ibid.*

11. Exhibit PR-2013-044-12 at 15, Vol. 1D.

12. *Valcom Consulting Group Inc.* (9 January 2014), PR-2013-030 (CITT).

16. On January 16, 2014, PWGSC wrote to Valcom stating that the matter was under review.¹³ Further e-mails exchanged between the parties from January 17 to February 3, 2014, indicated that Valcom was still waiting for a response from PWGSC.¹⁴

17. On February 13, 2014, Valcom wrote to senior management at PWGSC, reiterating its objection and alleging that a failure of the DCC had likely affected other suppliers as well.¹⁵

18. On February 21, 2014, PWGSC informed Valcom that an internal review had confirmed that Valcom's electronic bid package had not been submitted through the DCC, which was a mandatory requirement of the solicitation.¹⁶ PWGSC therefore maintained its decision to disqualify Valcom's bid.

19. As stated above, Valcom filed the present complaint with the Tribunal on March 7, 2014.

POSITIONS OF PARTIES

PWGSC

20. According to PWGSC, there is no evidence to support Valcom's allegation that the required component of its bid was submitted electronically through the DCC. To the contrary, the activity log on the DCC showed that Valcom last accessed its electronic bid on March 27, 2013, with no record of it having selected the "Submit" option that was required in order for its bid to be submitted through the DCC.

21. PWGSC argued that, if Valcom had successfully submitted its bid electronically (which PWGSC denied), then it would have been confirmed by three different means, including an online receipt, a confirmation e-mail and a change in status from "Completed" to "Submitted" on Valcom's "Dashboard" page in the DCC. However, Valcom provided no evidence of having received such confirmation. PWGSC submitted that the absence of any confirmation should have alerted Valcom to the fact that its electronic bid was not properly submitted. In PWGSC's view, Valcom thus failed to exercise its due diligence as a bidder to ensure that its bid met all the essential requirements of the solicitation.

Valcom

22. In response to the GIR, Valcom reiterated its allegation that its bid had been rendered non-compliant through no fault of its own, but rather due to a failure of the DCC that somehow prevented the successful transmission to PWGSC of Valcom's electronic bid, which Valcom submitted through the DCC on April 4, 2013. Valcom referred to another (unidentified) bidder whose bid for the same solicitation was also deemed non-responsive due to difficulties that had been encountered in uploading the electronic component of its bid through the DCC, but was ultimately issued a TBIPS SA and a SO after having presented its arguments to PWGSC.¹⁷ No evidence in support of this allegation was filed on the record.

13. Exhibit PR-2013-044-12, Exhibit 22, Vol. 1E.

14. *Ibid.*

15. *Ibid.*

16. *Ibid.*

17. Exhibit PR-2013-044-14, Vol. 1E.

RELEVANT PROVISIONS OF THE SOLICITATION

23. The relevant provisions of the solicitation read as follows:¹⁸

COMPONENT 1 – REQUEST FOR BIDS**PART 1 – GENERAL INFORMATION**

...

5. Key Terms

...

5.4 The **Centralized Professional Services System** or **CPSS** is a web-based system created as part of PWGSC's Professional Services National Procurement Strategy to support a single portal for professional services. . . . *The Supplier Module allows a supplier through a Main Supplier Contact (as defined below) to:*

- (i) create and manage **Contacts** . . . ;
- (ii) *input and submit data as part of a solicitation process;*
- (iii) track the progress/status of data input against bid solicitation(s) and retrieve the data for use in other solicitations;

...

5.5 The **Data Collection Component** or **DCC** of the CPSS Supplier Module . . . *will display information on methods of supply in a "dashboard" format, providing both information that has been submitted by a supplier and information on upcoming and closed solicitations for professional services.*

5.6 . . .

...

While suppliers normally have the option to submit their tender to Canada in writing directly, by mail or by other means, *due to the unique nature of this solicitation, certain aspects of a bidder's bid must be submitted only by electronic transmission*

...

PART 2 – BIDDER INSTRUCTIONS**1. Standard Instructions, Clauses and Conditions**

...

1.3 Bid Participation

Although this solicitation may result in a Bidder receiving a Standing Offer, a Supply Arrangement, or both, *a Bidder's bid must contain its response to all the requirements of this bid solicitation. . . .*

...

2. Submission of Bids

While suppliers normally have the option to submit their tender to Canada in writing directly, by mail, or by other means, *due to the unique nature of this solicitation, bids must be submitted only in the following manner:*

18. Exhibit PR-2013-044-12, Exhibit 1, Vol. 1D.

(i) physically to Public Works and Government Services Canada (PWGSC) Bid Receiving Unit by the date, time and place indicated on page one of the bid solicitation for the elements of the bid that must or may be submitted in Print; and

(ii) *electronically through the Data Collection Component of CPSS by the date and time as indicated on page one of the bid solicitation for the bid elements that must or may be submitted by electronic transmission.*

...

PART 3 – BID PREPARATION INSTRUCTIONS

1. Bid Preparation Instructions

1.1 *Canada requires that bidders provide their bid in hard copy and as an electronic submission as identified in the Submission Grid below. Specifically, bidders must provide as follows:*

Section I *Technical Bid:* To the PWGSC Bid Receiving Unit, *one Print copy* of the Technical Bid as detailed in Attachment B and Attachment C, *except where identified in the Submission Grid (below) as being required to be submitted through the Data Collection Component (DCC) of the Supplier’s Module of the CPSS.*

Section II *Financial Bid:* Through the DCC of the Supplier’s Module of the CPSS, the entire Financial Bid for the RFSO. *Only information submitted through the DCC will be considered for the Financial Bid.*

Section III *Certifications:* For the Certifications as detailed in Component I, Part 5 and Attachment E, *a Print copy of the Certification or submission through the DCC, as specified in the Submission Grid.*

...

1.3 The Data Collection Component of the Supplier’s Module of the CPSS

Bidders must submit their financial bids and most of their technical bids as specified in Part 3 through the Data Collection Component of the Supplier’s Module of the CPSS.

To access the Data Collection Component:

...

4. Enter all the required data into the Data Collection Component

5. *Print the required parts of the Data Collection Component and submit with the hard copy of the bid by the closing date, time, and location indicated on page one (1) of this solicitation. . . .*

...

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

1. Evaluation Procedures

(a) *Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical and RFSO financial evaluation criteria. . . .*

...

2. Basis of Selection

All elements of the bid solicitation that are mandatory requirements are identified specifically with the words “must” or “mandatory”. *Bids that do not comply with each and every mandatory requirement applicable to the offer and/or arrangement will be considered non-responsive for that offer and/or arrangement. . . .*

[Emphasis added]

24. Section 5.2 of the “2005 (2012-11-19) Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements”, incorporated by reference into the RFSO and the RFSa,¹⁹ provides as follows: “It is the bidder’s responsibility to: . . . c. submit by closing date and time a complete bid”.

ANALYSIS

25. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Subsection 30.14(2) requires the Tribunal to determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

26. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *Agreement on Internal Trade*,²⁰ the *North American Free Trade Agreement*,²¹ the *Agreement on Government Procurement*,²² the *Canada-Chile Free Trade Agreement*,²³ the *Canada-Peru Free Trade Agreement*,²⁴ the *Canada-Colombia Free Trade Agreement*²⁵ and the *Canada-Panama Free Trade Agreement*.²⁶

Relevant Provisions of the Applicable Trade Agreements

27. Subsection 506(6) of the *AIT* provides as follows:

. . . The 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.

28. Article 1015 of *NAFTA* provides as follows:

1. An entity shall use procedures for the submission, receipt and opening of tenders and the awarding of contracts that are consistent with the following:

19. In the case of the RFSa, the same section 5.2 is incorporated by reference to the “2008 (2012-11-19) Standard Instructions – Request for Supply Arrangements – Goods or Services”.

20. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

21. *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) [*NAFTA*].

22. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*]. For the purposes of the present inquiry, the 1994 version of the *AGP* applies because the solicitation in question was issued before the revised version of the *AGP* entered into force on April 6, 2014.

23. *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.

24. *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).

25. *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).

26. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

...

(c) a tender made by telex, telegram, telecopy or other means of electronic transmission must be confirmed promptly by letter or by the dispatch of a signed copy of the telex, telegram, telecopy or electronic message;

...

In this paragraph, “means of electronic transmission” consists of means capable of producing for the recipient at the destination of the transmission a printed copy of the tender.

2. No entity may penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity’s procedures so provide.

...

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . ;

...

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; . . .

29. The other applicable trade agreements have similar obligations.²⁷

Did PWGSC Improperly Disqualify Valcom’s Proposal?

30. The parties agreed that Valcom accessed the DCC of the CPSS to prepare the electronic component of its bid during the solicitation period.²⁸ However, PWGSC contested Valcom’s claim that it submitted the electronic component through the DCC on April 4, 2013.²⁹ The parties did not dispute the fact that Valcom submitted to the BRU the required hard copy component prior to bid closing.

31. The issue in this inquiry is therefore whether PWGSC improperly disqualified Valcom’s bid for failure to conform to the mandatory requirements of the solicitation, on the basis that certain elements of Valcom’s bid were not received electronically through the DCC. A related issue is whether PWGSC essentially “mishandled” Valcom’s bid due to a system failure or error in the DCC that somehow prevented successful transmission of the electronic component to PWGSC.

32. It is well established in Tribunal jurisprudence that, when responding to a solicitation, the onus is on the bidder to demonstrate that it meets all the mandatory requirements of the procurement.³⁰ Accordingly, it is incumbent upon a bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant with all essential elements of a solicitation.³¹ For its part, when evaluating a bid, the government

27. See, for example, Article XIII of the *AGP*, paragraphs 1(a), 4(a) and 4(c).

28. Exhibit PR-2013-044-12 at 3, Vol. 1D.

29. *Ibid.* at 16.

30. *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para 16; *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

31. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

institution must ensure that the bid thoroughly and strictly complies with the mandatory requirements identified in the tender documents.³²

33. In the present case, it was clearly a mandatory requirement on the face of the TBIPS solicitation documents that certain parts of a bidder's bid had to be submitted electronically through the DCC, whereas other parts had to be submitted in hard copy, or through both methods. For instance, para. 5.6 of Part 1 of Component 1 stated that, "... due to the unique nature of this solicitation, certain aspects of a bidder's bid must be submitted only by electronic submission"³³

34. According to PWGSC, the mandatory requirement for certain elements of bidders' bids to be submitted electronically was an operational necessity for the administration of the TBIPS solicitation process, given the broad scope and complexity of the solicitation and the large number of potential suppliers involved.³⁴ The Tribunal is of the view that there is nothing to suggest that this requirement was unreasonable or illegitimate, or that it was formulated in a way to favour a particular supplier.³⁵ On the contrary, PWGSC's use of an electronic submission process was reasonable in order to manage a procurement process of this nature.

35. The solicitation documents expressly indicated that bidders were responsible for ensuring that all mandatory requirements, certifications and elements required for bid validity were met in their bids.³⁶ To assist bidders with the preparation and submission of their bids, a "Submission Grid" was provided, which grouped bidders into six classes on the basis of their status and circumstances.³⁷ For each class, the grid specified which elements of a bidder's bid had to be submitted in hard copy only, electronic copy only, or through both methods.

36. PWGSC submitted that the requirements of class "G" were understood to be applicable to Valcom, which the latter did not dispute.³⁸ Accordingly, Valcom was required to submit two parts of its bid by way of electronic transmission only, including its "Region & Metropolitan Area selection" for the technical bid, and its financial offer (required for the RFSO only). Various other elements had to be submitted both electronically and in hard copy, including parts of the technical bid and a "Grandfather" certification. For other certifications, class "G" bidders could choose whether to submit them in hard copy or electronically.

32. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA).

33. Exhibit PR-2013-044-12, Exhibit 1, Vol. 1D.

34. For instance, PWGSC reported that, during the procurement process, it issued 16 amendments to the solicitation, providing answers to 357 questions from potential suppliers. At bid closing, PWGSC had received a total of 381 bids in response to the solicitation. Furthermore, the broad scope and complexity of the solicitation was demonstrated by the numerous categories, tiers, levels of expertise, regions and metropolitan areas for which bidders could submit their bids. See Exhibit PR-2013-044-12 at 4-5, 13, 14, Vol. 1D; Exhibit PR-2013-044-12, Exhibit 1, Component I, Part 2 at 12, 15-16, Vol. 1D.

35. The Tribunal has previously held that a government institution is entitled to define and meet its reasonable and legitimate operational requirements, as long as the procurement is not structured to favour any particular potential supplier. See *Agri-SX Inc.* (27 March 2013), PR-2012-051 (CITT) at paras. 26-29; *723186 Alberta Ltd.* (12 September 2011), PR-2011-028 (CITT) at paras. 19-21.

36. Exhibit PR-2013-044-01A, Exhibit 1, Component I, Part 3, para. 1.4, Vol. 1D.

37. *Ibid.*

38. Column "G" applies to: "**Current TBIPS Holder who is also a [Cyber Protection SA] and/or [Telecommunications Stream SA] Holder: The Bidder IS applying for addition Tier(s) and/or Category(ies), or is otherwise modifying their Technical Offer already on file from the previous TBIPS Solicitation**". See Exhibit PR-2013-044-12, Exhibit 1, Component I, Part 3, para. 1.4, Vol. 1D.

37. As stated in paragraph 1(a) of Part 4 of Component I, bids were to be “. . . assessed in accordance with the entire requirement of the bid solicitation, including the technical and RFSO financial evaluation criteria.” Therefore, even though an evaluation of the financial bid was only required for a bidder to be issued an SO and not an SA, the financial bid still had to be submitted in order for the bid to comply with the *entire requirement* of the solicitation and be considered complete for evaluation by PWGSC.

38. The evidence on the record shows that Valcom accessed the DCC and entered the required information for its bid in response to the TBIPS solicitation.³⁹ As stated above, this was not disputed by the parties. However, there is nothing before the Tribunal indicating that Valcom actually submitted the electronic component of its bid through the DCC prior to bid closing. Indeed, Valcom’s assertion that it selected the “Submit” option in the DCC is not supported by any of the evidence on the record.

39. Specifically, PWGSC filed a copy of Valcom’s TBIPS activity report for the DCC, which revealed that the electronic component of Valcom’s bid was entered into the system but not submitted.⁴⁰ Bids that were successfully submitted were recorded under a specific code (114300), which did not appear in Valcom’s activity report. In fact, the report indicated that Valcom’s bid in the DCC was last accessed on March 27, 2013, and that it was never submitted.

40. Upon successful submission of a bid through the DCC, the system was designed to provide three separate forms of confirmation to bidders. First, the solicitation documents specifically advised bidders that the DCC’s Dashboard page would provide the status of information submitted by a supplier through the DCC.⁴¹ Once bidders had completed and saved their bids in the DCC, the status report on the Dashboard page would show the bid as being “Completed”. Bidders then had to select the “Submit” option in order for their bids to be transmitted electronically to PWGSC, which would be confirmed by a change in their bid status on the Dashboard from “Completed” to “Submitted”, along with the date.⁴²

41. The other two forms of confirmation were an online receipt and a confirmation e-mail that were sent out automatically after bid submission through the DCC. These additional forms of confirmation were described in a user guide for the DCC, which also specified that suppliers “. . . must click on the ‘Submit Response’ for your bid to be submitted.” Potential suppliers were notified about the user guide when using the DCC by way of links provided on the main CPSS e-Portal Web page and also in the DCC bid response template.⁴³

42. PWGSC also referred to the user guide in two of its answers to questions from potential suppliers during the procurement process.⁴⁴ As stated above, it was the responsibility of each bidder to read all documents related to this solicitation and to ensure compliance with all mandatory criteria, certifications and elements required for bid validity, which, in the Tribunal’s view, included the user guide for the DCC.

43. In light of the above, the Tribunal finds not only that PWGSC had procedures in place to confirm (in writing) the receipt of bids submitted by way of electronic transmission through the DCC but also that it took steps to ensure that potential suppliers were well informed of those confirmation procedures.

39. Exhibit PR-2013-044-01B (protected), Appendix 3, Vol. 2; Exhibit PR-2013-044-12, Exhibit 23, Vol. 1E.

40. Exhibit PR-2013-044-12, Exhibit 23, Vol. 1E.

41. Exhibit PR-2013-044-12, Exhibit 1, Vol. 1D.

42. *Ibid.*, Exhibit 3.

43. Exhibit PR-2013-044-12, Exhibits 2, 4, 5, Vol. 1D, Exhibit 6, Vol. 1E.

44. Amendment No. 5, dated February 14, 2013, question and answer 33(1)(c), and amendment No. 10, dated March 4, 2013, question and answer 143(2)(a). See Exhibit PR-2013-044-12, Exhibits 8, 13, Vol. 1E.

44. Furthermore, Valcom disclosed no evidence (and, in fact, made no argument) indicating that it received any of the three forms of confirmation messages that were supposed to be provided to bidders, such as, for example, a screen shot of the Dashboard page showing the status of its bid as having been “Submitted”, or a copy of the e-mail confirmation message. Nor did Valcom provide any other evidence demonstrating that the DCC component of its bid was actually submitted.

45. As a result, the Tribunal can only conclude that Valcom’s electronic bid was not properly submitted through the DCC prior to bid closing. In its view, Valcom knew or ought to have reasonably known to expect the three forms of confirmation of receipt from PWGSC following the successful submission of the electronic component of its bid because such confirmation was clearly referred to in the solicitation documents and the DCC user guide.

46. The lack of any confirmation messages should have raised a red flag for Valcom that something was wrong—especially given that it is a sophisticated firm specializing in informatics services—and prompted it to verify the receipt of its bid with PWGSC without delay. However, Valcom failed to raise the matter directly with PWGSC and question the lack of confirmation of receipt following what should readily have been recognized as an unsuccessful attempt to submit the electronic component through the DCC.

47. The Tribunal acknowledges that the e-mail correspondence between Valcom and PWGSC during the bid evaluation period shows that Valcom did eventually question PWGSC about whether there was a problem with its bid, due to the nature of the clarification questions, and sought to confirm with PWGSC that the requested information had in fact been received with its bid. While PWGSC did not directly respond to Valcom’s questions in that regard, the Tribunal notes that a significant amount of time (four months or more) had elapsed between bid closing and the clarification questions that gave rise to Valcom’s concerns that PWGSC seemed to be missing certain information.

48. The Tribunal is of the view, as stated above, that Valcom should have acted much earlier to notify PWGSC, i.e. as soon as it failed to receive confirmation of its electronic bid submission; a fact which, the Tribunal notes, was not clearly articulated by Valcom in later communications relating to PWGSC’s clarification questions.

49. The Tribunal does not consider that PWGSC acted unreasonably or in breach of the applicable trade agreements. In fact, it had no obligation to notify Valcom during the evaluation phase that its bid was non-compliant. Ultimately, as was the case for each of the numerous other potential suppliers that bid on the TBIPS, it was Valcom’s responsibility to ensure that it met the mandatory requirements of the solicitation at the time of bid closing.

50. Accordingly, the Tribunal finds that Valcom has failed to establish that it met the mandatory requirements of the solicitation, namely, the electronic bid submission requirement. In addition, the Tribunal concludes that Valcom failed to exercise its due diligence and ensure that its complete bid was filed in accordance with the mandatory requirements of the solicitation.

51. The remaining issue to be determined is whether there was an internal system failure or error in the DCC that somehow prevented the electronic transmission of Valcom’s bid to PWGSC, thereby constituting a failure on PWGSC’s part for which Valcom should not have been penalized.

Did PWGSC Mishandle the Electronic Component of Valcom's Proposal?

52. The Tribunal recognizes that, in general, conducting procurements using information technology systems and software has become increasingly common in modern society and can provide a variety of benefits to both procuring entities and potential suppliers, such as procedural efficiencies, more effective use of resources and improved accessibility for suppliers. Of course, electronic means of bid submission are not always perfect, and system malfunctions are a real possibility. The potential for human error by users of an electronic system is also a factor. Yet, the possibility of such errors may be minimized to some extent where the procuring entity provides clear and detailed information to potential suppliers regarding the operation of the software and systems being used to conduct a particular procurement and maintains mechanisms for handling questions or concerns from users and for providing technical support.

53. In the present case, the TBIPS solicitation documents provided clear and detailed instructions for bidders on how to access, register and use the CPSS Supplier Module and, in particular, the DCC, for the submission of bids. In the event of any questions or concerns regarding any aspect of the electronic transmission of data through the DCC, suppliers were encouraged to submit these questions and concerns to PWGSC "... as early as possible in the solicitation period"⁴⁵

54. This reinforces the Tribunal's earlier finding that Valcom should have, without delay, alerted PWGSC to the fact that it did not receive a confirmation of submission; had Valcom acted in that manner, it would have been able to ascertain with PWGSC that no technical issue of PWGSC's cause had occurred; Valcom would have then been able to take measures to ensure the successful transmission of the electronic component of its bid prior to bid closing.

55. Furthermore, Valcom's allegation that its bid was not received by PWGSC due to technical issues with the DCC was not supported by any evidence. If an error or failure had occurred on April 4, 2013, when Valcom allegedly selected the "Submit" option to transmit its bid through the DCC, then it should have been logged as an error or failure code in the DCC activity report. However, there was no such recorded entry in the report, nor was the Tribunal provided with any other information indicating that Valcom experienced technical difficulties when using the DCC, such as the appearance of an error message on the DCC screen or a freezing/crashing of the program.

56. To support its allegation of technical issues, Valcom referred to at least one other supplier that purportedly would have experienced similar problems using the DCC. Although it was unable to substantiate this claim, there is some evidence on the record that other bidders experienced technical issues with the DCC during the solicitation period. Specifically, question 235(3) in amendment No. 15 stated that a potential supplier was "...experiencing technical difficulties (freezes) with the online data entry component . . ." and referred to a notice on the CPSS e-Portal that stated "CPSS is currently experiencing intermittent technical difficulty." However, that instance of a technical issue did not appear to relate directly to the submission of a bid through the DCC. The fact that only 1 question related to technical issues with the DCC out of a total of 357 questions submitted during the procurement process indicates that such issues were far from commonplace.

57. Moreover, PWGSC noted that only 5 out of a total of 381 bidders failed to submit the specific component of their bids through the DCC, including Valcom.⁴⁶ The high rate (98.7 percent) of successful bid submissions through the DCC, as reported by PWGSC, lends further support to the conclusion that there

45. Exhibit PR-2013-044-12, Exhibit 1, Component I, Part I, para. 5.6, Vol. 1D.

46. Exhibit PR-2013-044-12 at 20-21, Vol. 1D.

does not appear to have been any widespread technical issues with the DCC whatsoever. That is not to say that a technical issue affecting even one or two bidders should not be of any concern, but given the lack of any evidence that there was such an occurrence in Valcom's case leaves the Tribunal unable to conclude that this was the reason for which the electronic component of Valcom's bid submission was not received by PWGSC.

58. Therefore, the Tribunal has decided that there is no basis for finding that the DCC was defective or that PWGSC failed to follow the prescribed requirements for the solicitation in such a way that breached the procurement provisions of the applicable trade agreements.

59. The Tribunal wishes to address the fact that two of the five bidders from whom PWGSC did not receive the electronic component had submitted a printout of the information entered in the DCC together with the required hard copy component of their respective bids.⁴⁷

60. Upon review, PWGSC ultimately decided to accept these two bids in the interest of what it justified as fairness and flexibility, on the basis that it had received all the required bid materials in full prior to bid closing.⁴⁸ However, PWGSC explained, in its supplementary submissions, that it was unable to extend similar relief to Valcom because it had not provided the required electronic component, either through the DCC or as a printout copy through the BRU, prior to bid closing.⁴⁹ As stated above, Valcom chose not to comment on those submissions.

61. While it was not a mandatory requirement to submit a printout of the information entered in the DCC, the bid preparation instructions for the solicitation advised bidders to act prudently by printing the required parts of the DCC and submitting them with the hard copy of the bid by the closing date, time and location.⁵⁰ Had Valcom provided such a hard copy back-up of the electronic component to PWGSC prior to bid closing, it could have been entitled to the same treatment as the other two suppliers for whom PWGSC accepted the hard copy of the DCC printout as a suitable alternative. In the Tribunal's view, those appear to have been exceptional circumstances and, unfortunately for Valcom, it was not in that same position, given that it did not submit a printout of the electronic component of its bid.

62. On the basis of the foregoing, the Tribunal therefore finds that the complaint is not valid.

COSTS

63. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

64. The Tribunal's preliminary view is that this complaint has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The procurement was moderately complex, given the large scope of the TBIPS solicitation, involving the provision of a broad range of informatics professional services to various government departments and agencies, on an as required basis. However, the complexity of the complaint was low, as it essentially involved the requirement that a

47. Exhibit PR-2013-044-16, Vol. 1E.

48. *Ibid.*

49. Exhibit PR-2013-044-16 and Exhibit PR-2013-044-19, Vol. 1E.

50. Exhibit PR-2013-044-12, Exhibit 1, Vol. 1D.

component of the bid be submitted electronically. While the Tribunal requested additional submissions by the parties and the time frame for the proceedings was extended to 135 days, the complaint proceedings as a whole were not complex, as the additional information filed by PWGSC was limited to its clarification on two questions of fact and Valcom did not provide any comments on those submissions. Furthermore, there were no motions and no hearing was held.

65. Accordingly, as contemplated by the Guideline, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

66. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

67. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Valcom. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey
Presiding Member