



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-010

Survival Systems Training Limited

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, September 3, 2015*

TABLE OF CONTENTS

DETERMINATION..... i

STATEMENT OF REASONS 1

 RELEVANT PORTIONS OF THE RFP 1

 BACKGROUND TO THE COMPLAINT 1

 POSITIONS OF PARTIES..... 3

 PWGSC..... 3

 SSTL..... 4

 TRIBUNAL’S ANALYSIS..... 4

 DETERMINATION OF THE TRIBUNAL..... 6

IN THE MATTER OF a complaint filed by Survival Systems Training Limited 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

SURVIVAL SYSTEMS TRAINING LIMITED

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.

Ann Penner

Ann Penner

Presiding Member

Tribunal Member: Ann Penner, Presiding Member

Counsel for the Tribunal: Jidé Afolabi
Cassandra Baker (Case Assistance Officer)

Registrar Officer: Haley Raynor

Complainant: Survival Systems Training Limited

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Kathleen McManus
Susan Clarke
Ian McLeod
Roy Chamoun

Intervener: Falck Safety Services

Please address all communications to:

The Registrar
Canadian International Trade Tribunal Secretariat
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

1. On June 8, 2015, Survival Systems Training Limited (SSTL) 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 Request for Proposal (RFP) (Solicitation No. W6570-15M640/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence, for underwater egress and ocean survival training to prepare participants for aircraft water-entry situations.

2. SSTL complained that there were inconsistencies in the evaluation process undertaken by PWGSC. As a remedy, SSTL requested the termination of the contract as awarded, along with either the re-evaluation of the bids or the issuance of a new solicitation.

RELEVANT PORTIONS OF THE RFP

3. On March 11, 2015, PWGSC issued the RFP, with a closing date of April 21, 2015.

4. The RFP included Article 4.2.1, which reads as follows:

A bid must comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.

A site tour of the lowest compliant bidder will be conducted in order to confirm that the course training and facilities meet the mandatory criteria.

5. On March 31, 2015, PWGSC amended the second paragraph of Article 4.2.1, to read as follows:

A site tour of the compliant bidder(s) will be conducted in order to confirm that the course training and facilities meet the mandatory criteria as described in the bidder(s) submission.

6. Further, Section I of Article 3.1 of the RFP reads as follows:

In their technical bid, bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements. Bidders should demonstrate their capability and describe their approach in a thorough, concise and clear manner for carrying out the work.

The technical bid should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the bid will be evaluated. . . .

7. In addition, the RFP included a number of mandatory requirements, four of which are at issue in this complaint. M4(i) required that bidders propose a crane and super-structure certified for the lifting of humans. M4(iv) required that bidders propose an escape trainer capable of rolling 180 degrees in six seconds or less. M6 required that bidders propose environmental effects simulation systems with emergency stops located at the pool deck level. M11(vii) required that the crane, super-structure and escape trainer proposed by bidders be subjected to routine inspection, at a minimum annually, by a certified authority.

BACKGROUND TO THE COMPLAINT

8. SSTL submitted a bid on April 13, 2015.

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

9. On April 22, 2015, a member of PWGSC's evaluation team contacted SSTL to schedule a site tour. The following day, the parties agreed to a site tour on May 1, 2015.

10. On April 28, 2015, PWGSC sent an email to SSTL, indicating that the evaluation team required SSTL to clarify how its bid met the mandatory requirements noted above. The email went on to note that as a site tour of SSTL's facility was scheduled for May 1, 2015, PWGSC would appreciate if SSTL provided clarification on those mandatory requirements at its earliest convenience. Furthermore, the email indicated that should a response not be received prior to the site tour, the tour would proceed "to confirm remaining outstanding requirements".

11. On April 29, 2015, SSTL replied that, during the site tour, it would "provide clarification, demonstrations and documentation" on the items identified by PWGSC. The site tour subsequently went ahead as scheduled, and PWGSC completed its evaluation of the bids.

12. In a letter dated May 21, 2015, PWGSC informed SSTL that its bid had not been successful, and that the contract had been awarded to Falck Safety Services (FSS).² PWGSC also indicated that SSTL had failed to "meet each and every mandatory requirement at bid closing", as required by the RFP and as will be explained more fully below.

13. On May 22, 2015, SSTL responded to PWGSC's letter, disputing PWGSC's conclusion that its bid did not meet the mandatory requirements in question. It argued that PWGSC's email of April 28 and site tour of May 1 indicated that the evaluation team had found its bid to be fully responsive. It also explained how, in its view, its bid met the mandatory requirements, as set out below.

14. On the same day, PWGSC confirmed receipt of SSTL's response, and indicated it would respond the following week.

15. However, SSTL did not receive a response from PWGSC the following week. Accordingly, it filed a complaint with the Tribunal on June 2, 2015. The Tribunal found that SSTL's complaint was premature, and noted that should PWGSC fail to respond within 30 days of its decision, it would deem the failure to respond to be a constructive denial of relief, such that SSTL may then file another complaint within the time limit stipulated in the *Regulations*.³

16. On June 5, 2015, PWGSC responded to SSTL, maintaining that SSTL had not met all of the mandatory requirements of the RFP at bid closing. PWGSC also maintained that the evaluation team had not found SSTL's bid to be compliant at the time of the site tour, and that the evaluation team had not even been in a position to confirm whether the bid was compliant during the site tour. Instead, the evaluation team determined the compliance of SSTL's bid after the site tour had taken place in light of the contents of SSTL's bid.

17. On June 8, 2015, SSTL filed the complaint at issue with the Tribunal. 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 *Regulations*, the complaint was accepted for inquiry by the Tribunal on June 11, 2015.

18. Upon a request by FSS, the Tribunal granted it intervener status on July 3, 2015. However, FSS did not file any submissions with regard to the complaint.

2. PWGSC indicated the contract award was in the amount of \$595,670.

3. *Survival Systems Training Limited* (3 June 2015), PR-2015-009 (CITT).

19. On July 7, 2015, PWGSC filed its Government Institution Report (GIR) with regard to the complaint.
20. On July 27, 2015, SSTL filed its comments on the GIR.
21. Given that there was sufficient 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.

POSITIONS OF PARTIES

PWGSC

22. PWGSC highlighted previous Tribunal rulings that “the onus is on a bidder to demonstrate compliance with a mandatory requirement”⁴ to argue that SSTL had not met its obligations when submitting its bid. Specifically, PWGSC noted that SSTL’s bid fell short in the following ways:

- M4(i) – PWGSC noted that the certificate issued by Lloyd’s Register and submitted by SSTL explicitly indicated that the “review of any structural components [is] excluded from the certification”;
- M4(iv) – PWGSC noted that the question of whether SSTL’s escape trainer could roll 180 degrees in six seconds or less was not addressed in SSTL’s bid;
- M6 – PWGSC noted that page 134 of SSTL’s bid indicated that the wave effect had two emergency stops, “one on wave operator panel” and “one on system control panel in wave chamber room”; thus, neither stop was located at the pool deck level; and
- M11(vii) – PWGSC noted it had contacted Survival Systems Limited (SSL), the original equipment manufacturer, and SSL could not validate the certificate of one of the two individuals proposed by SSTL due to a need for the annual renewal of its certificates. PWGSC also noted that SSL had indicated the other individual was not certified or authorized to conduct any work on the equipment it supplies.⁵

23. In regard to the conduct of the evaluation team, PWGSC argued that government institutions must evaluate whether and how bids meet mandatory requirements in a strict and thorough manner, and limit their evaluations to the actual contents of bid documents.⁶ Therefore, PWGSC suggested that any consideration of the additional documents provided by SSTL to the evaluation team during the site tour would have constituted bid repair.⁷

4. GIR at para. 4. In this regard, PWGSC relied upon *Samson & Associates* (19 October 2012), PR-2012-012 (CITT) at para. 28, as well as *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37, in which the Tribunal noted that “it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and properly understood . . .” PWGSC also relied on Section I of Article 3.1 of the RFP.

5. Both individuals had certificates dated for the year 2010.

6. In this regard, PWGSC relied upon *IBM Canada Ltd.* (7 September 2000), PR-99-020 (CITT) at para. 7, as well as *Storeimage* (18 January 2013), PR-2012-015 (CITT) at para. 67, and *Secure Computing* (23 October 2012), PR-2012-006 (CITT) at para. 41.

7. GIR at para. 58. The Tribunal has noted in the past, including in *Maxxam Analytics Inc.* (20 September 2007), PR-2007-017 (CITT) at para. 37, that the acceptance of new information after bid closing does constitute bid repair, which is an unacceptable modification to submitted bids. See also *NOTRA Environmental Services Inc.* (16 December 1997), PR-97-027 (CITT) and *Bell Mobility* (14 July 2004), PR-2004-004 (CITT).

24. PWGSC also addressed an allegation by SSTL that SSL was in a conflict of interest as its majority owner was also an owner of FSS, the contract awardee. PWGSC noted that SSTL chose to premise its bid on equipment manufactured by SSL and, in doing so, knew that mandatory requirement M11(vii) would require SSL certification.⁸

25. PWGSC submitted that the Tribunal should conclude that SSTL's complaint is not valid and, further, that it should be awarded its costs with regard to the complaint.

SSTL

26. As noted above, SSTL maintained that its bid was fully compliant with the mandatory requirements of the RFP. Specifically, SSTL argued that, with regard to mandatory requirement M4(i), the Lloyd's Register certification provided in its bid demonstrated "irrefutable compliance with 'industry equivalent' standards".⁹ SSTL also indicated it had provided "stamped engineering drawings" of the super-structure to the evaluation team during the site tour.

27. Concerning mandatory requirement M4(iv), SSTL asserted that "[n]o criteria [were] given, either in the RFP or during site visit, on the parameters and criteria for how the timing of the rollover is captured and/or measured."¹⁰ SSTL also indicated the evaluation team had in fact witnessed a demonstration of the capabilities of its escape trainer to roll 180 degrees in six seconds or less.

28. With regard to mandatory requirement M6, SSTL alleged that during the course of the site tour, an evaluator actuated a deck-level emergency stop and observed all environmental effects, including waves, cease.¹¹ SSTL also referred to a picture of an emergency stop button, labelled Figure 22 on page 24 of its bid.

29. With regard to mandatory requirement M11(vii), SSTL indicated that PWGSC should not have relied on information from SSL as it was in a conflict of interest, given that its majority owner was also an owner of FSS, the contract awardee.¹²

30. SSTL reiterated its position that it was compliant as Article 4.2.1 of the RFP indicated site tours would be conducted with regard to the facilities of *compliant* bidders.¹³ Further, SSTL noted that the evaluation team did not notify it that any documentation given during the site tour would be disregarded or deemed inadmissible.¹⁴ Finally, SSTL stated that it had received affirmative responses when, during the site tour, it asked the evaluation team whether it was satisfied that SSTL met the requirements of the RFP.

TRIBUNAL'S ANALYSIS

31. The Tribunal has consistently held that bidders are fully responsible for demonstrating compliance with all mandatory requirements of an RFP. Likewise, the Tribunal has noted that government institutions are responsible for evaluating how bidders comply with those mandatory requirements, and that this

8. GIR at para. 83.

9. Comments on the GIR at para. 18.

10. Comments on the GIR at para. 29.

11. Comments on the GIR at para. 34.

12. Comments on the GIR at para. 46. SSTL also indicated the existence of ongoing litigation between itself and SSL.

13. Comments on the GIR at paras. 7, 8.

14. Comments on the GIR at para. 11.

evaluation process must be carried out strictly, thoroughly and only with regard to the actual contents of proposals as submitted by bid closing. While clarifications may be sought,¹⁵ they must refer or relate to a better understanding of the contents of proposals and, as such, cannot take into account new information intended to form a substantive part of such proposals.

32. When considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness. In so doing, the Tribunal accords a large measure of deference to evaluators absent a demonstration by a complainant that the evaluation at issue was unreasonable. Accordingly, the Tribunal will only intervene if evidence indicates that “the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.”¹⁶

33. In this case, the RFP stated that bidders were to explain how their bid satisfied all mandatory requirements. Moreover, the RFP was clear that bidders were to address the points subject to evaluation clearly and in sufficient depth.

34. On a review of SSSL’s bid, the Tribunal finds that SSSL failed to meet these requirements and did not demonstrate compliance with each of the four mandatory requirements at issue in this complaint at the time of bid closing. The Tribunal also finds that the evaluation team’s determination of non-compliance was reasonable.

35. As concerns mandatory requirement M4(i), SSSL failed to address the question of how the structural components excluded from review in the certificate issued by Lloyd’s Register were otherwise certified. While SSSL provided engineer stamped drawings to the evaluators during the site tour, it did not demonstrate such capacity in its bid at the time of bid closing. Consequently, as the stamped drawings were provided after bid closing, they must be seen as new information and an attempt at bid repair.

36. Further, as concerns mandatory requirement M4(iv), SSSL failed to address in its bid the question of whether its escape trainer could roll 180 degrees in six seconds or less. SSSL’s failure to address this point cannot be saved by its subsequent assertion that the evaluation team witnessed a demonstration of the capacity of its escape trainer to roll as required by the mandatory requirement. Quite apart from the fact that what was witnessed is in contention,¹⁷ SSSL’s objective for the demonstration was the introduction of new information to correct a deficiency in its bid and, as such, the demonstration constituted an attempt at bid repair.¹⁸

15. As noted by the Tribunal in *Bell Canada* (26 September 2011), PR-2011-031 (CITT) at para. 36, “a procuring entity may, in some circumstances, seek clarification of a particular aspect of a proposal, but it is generally not under any obligation to do so.” Reference can also be made to *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, *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13 and *The Masha Krupp Translation Group Limited* (25 August 2011), PR-2011-024 (CITT) at para. 21.

16. See *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 24.

17. The Tribunal considers it clear, based on the confidential portion of the GIR, that the evaluators’ impression or calculation of the rollover speed of the escape trainer, as witnessed during the site tour, differs from SSSL’s.

18. SSSL advanced two additional arguments. It asserted that no criterion was given regarding how the timing of the rollover would be measured. However, the Tribunal notes that it could have sought a clarification on that issue prior to bid closing but it neglected to do so. Also, it asserted that scientific tests have concluded that inversion in seven to eight seconds is sufficient to induce disorientation. However, as the RFP required six seconds, and as this assertion is essentially a post-solicitation challenge of the terms of the RFP, the Tribunal considers it irrelevant to a proper analysis of the grounds in this complaint.

37. Also, with regard to mandatory requirement M6, SSSL failed to sufficiently address in its bid the question of whether its environmental effects could be halted by way of emergency stops located at the pool deck level. The picture of an emergency stop button, labelled Figure 22 and contained on page 24 of SSSL's bid, was not sufficient with regard to the terms of that mandatory requirement, as the button's location relative to the pool deck could not be determined on the basis of the bid alone. Further, page 134 of SSSL's bid confused the issue even more as it stated that the emergency stops for the wave effect were in locations *other than* the pool deck. As stated earlier, shortcomings such as this cannot be saved through the provision of new information after bid closing, including the provision or demonstration of such during the site tour.¹⁹

38. With regard to mandatory requirement M11(vii), SSSL's bid failed to address the question of how the individuals it had nominated for the routine inspections of the crane and super-structure were certified. SSSL chose to base its bid on equipment manufactured by SSL: a company owned by FSS, its competition. In so doing, SSSL had to have been aware that SSL would have had to certify the inspections of the proposed equipment. Accordingly, SSSL effectively placed SSL in a possible conflict of interest by virtue of its own bid. Regardless of why SSL indicated it could not certify the individuals nominated by SSSL, the onus remained on SSSL to meet mandatory requirement M11(vii).

39. Considering these failures on the part of SSSL, the Tribunal considers PWGSC's evaluation to have been reasonable. The evaluation team applied themselves, did not ignore vital criteria, did not wrongly interpret the scope of any requirement, and based the evaluation of SSSL's bid only on disclosed criteria. It rightly considered the contents of SSSL's bid at the time of bid closing, notwithstanding what may have been said or provided during the site tour.

40. The simple fact that PWGSC scheduled a site tour with SSSL did not in and of itself justify SSSL's conclusion that its bid was compliant. In addition, any verbal indication evaluators may have given during the site tour, or any failure on their part to inform SSSL that they had to disregard any documentation intended to substantively add to its bid, did not warrant a conclusion that the bid was responsive to the RFP.

41. However, the Tribunal finds that PWGSC's actions may have unfortunately given SSSL an inaccurate signal, and created confusion in the bidder's mind. Nevertheless, while PWGSC's actions seemed to have (wrongly) raised the hopes of SSSL, they neither rendered the evaluation unreasonable nor prejudiced the outcome of the solicitation.

DETERMINATION OF THE TRIBUNAL

42. In light of the above, and pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal finds that SSSL's complaint is not valid.

43. Further to the *Procurement Cost Guideline*,²⁰ the Tribunal finds that the level of complexity of this complaint is Level 1. Accordingly, it awards costs to PWGSC in the amount of \$1,150, to be paid by SSSL.

Ann Penner
Ann Penner
Presiding Member

19. Further, while not consequential, it remains noteworthy, based on the confidential portion of the GIR, that the evaluators' assessment of the locations of the emergency stop buttons for the wave effect, as observed during the site tour, differs from SSSL's.

20. <http://www.citt.gc.ca/en/Procurement_costs_guidelines_e>