

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

# Procurement

DETERMINATION AND REASONS

File No. PR-2015-048

Dominion Diving Ltd.

٧.

Department of Public Works and Government Services

Determination issued Tuesday, March 29, 2016

> Reasons issued Monday, May 2, 2016



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IN THE MATTER OF a complaint filed by Dominion Diving Ltd. 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**

DOMINION DIVING LTD.

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.

Serge Fréchette Serge Fréchette Presiding Member

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

PR-2015-048

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#### STATEMENT OF REASONS

- 1. On December 21, 2015, Dominion Diving Ltd. (Dominion) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*. The complaint concerned a Request for Proposal (RFP) (Solicitation No. W3554-166143/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for labour, materials, tools and equipment to carry out diving services "... to install, level, and align Degaussing Range Pedestals... in HMC Dockyard, Halifax, Nova Scotia."
- 2. Dominion complained that PWGSC wrongly interpreted the scope of a mandatory requirement of the solicitation, failed to conduct the evaluation of bids in a procedurally fair manner and awarded the resulting contract to a bidder whose proposal did not meet a mandatory requirement of the solicitation. As a remedy, Dominion requested that the winning bidder be declared non-compliant and that the resulting contract be awarded to it instead.

#### RELEVANT PORTIONS OF THE RFP

- 3. On November 3, 2015, PWGSC issued the RFP, with a closing date of November 19, 2015.
- 4. The RFP included a number of provisions which are relevant to the complaint. Of over-arching importance is clause 4.2, which provides as follows:

#### 4.2 Basis of Selection

A bid must comply with all requirements of the bid solicitation to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.<sup>3</sup>

5. Specific to the allegations at issue in the complaint is section II of clause 3.1 of the RFP, which provides as follows:

#### 3.1 Preparation Instructions

. . .

#### **Section II: Certification Requirements**

Bidders must submit the certifications required in accordance with Part 5. If these certifications do not accompany the bid documents at the time of bid submission, they will be requested by the Contracting Authority as detailed in Part 6.4

6. Thus, provisions in Parts 5 and 6 of the RFP are engaged by the operation of section II of clause 3.1. The relevant provisions in Part 5 are clauses 5.1 and 5.2, which provide as follows:

#### 5.1 General

Bidders must provide the required certifications and related documentation to be awarded a contract. Canada will declare a bid non-responsive if the required certifications and related documentation are not completed and submitted as requested.

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

<sup>2.</sup> Exhibit PR-2015-048-09, Exhibit 1, clause 1.2(1)(a), Vol. 1A.

<sup>3.</sup> Exhibit PR-2015-048-09, Exhibit 1, Vol. 1A.

<sup>4.</sup> *Ibid*.

Compliance with the certifications bidders provide to Canada is subject to verification by Canada during the bid evaluation period (before award of a contract) and after award of a contract. The Contracting Authority will have the right to ask for additional information to verify bidders' compliance with the certifications before award of a contract. The bid will be declared non-responsive if any certification made by the Bidder is untrue, whether made knowingly or unknowingly. Failure to comply with the certifications, to provide the related documentation or to comply with the request of the Contracting Authority for additional information will also render the bid non-responsive.

#### 5.2 **Certifications Required Precedent to Contract Award**

The certifications listed below should be completed and submitted with the bid but may be submitted afterwards. If any of these required certifications is not completed and submitted as requested, the Contracting Authority will so inform the Bidder and provide the Bidder with a time frame within which to meet the requirement. Failure to comply with the request of the Contracting Authority and meet the requirement within that time period will render the bid non-responsive.

- 6. ISO 9001 registration documentation as per Part 6.7<sup>5</sup>
- Further, the relevant provision in Part 6 of the RFP is clause 6.7, which provides as follows: 7.

#### ISO 9001:2000 Quality Management Systems<sup>[6]</sup> 6.7

Before contract award and within 24 hours of written notification by the Contracting Authority the successful Bidder must provide its current ISO Registration Documentation indicating its registration to ISO 9001:2000.

Documentation and procedures of bidders not registered to the ISO standards may be subject to a Quality System Evaluation (QSE) by the Quality Assurance Authority before award of a contract.

- In addition, Annex F to the RFP, titled "STATEMENT OF CONTRACTOR 8. **REQUIREMENTS** (SOCR)" provides some additional context with regard to the above provisions. Clauses 1.4 and 1.5 of Annex F provide as follows:
  - 1.4 The Contractor shall be responsible for implementing a quality system appropriate to the scope of the work to be performed. It is recommended that the quality system be based on ISO 9001:2008 - Quality Management Systems - Requirements. It is not the intent to require that the Contractor be registered to the applicable standard[;] however, the Contractor's quality management system must address each requirement contained in the standard.
  - 1.5 The Contractor's Quality Management System should include, at a minimum, processes to:
    - Identify when work they perform or material they produce does not conform to their/our standards:
    - Ensure that any [non-conformance] is recorded and is corrected;

<sup>5.</sup> Ibid.

The RFP, as well as the parties, referred to "quality management system" and "quality system" interchangeably. As the Tribunal is satisfied that there is entirely no difference between these terms, the Tribunal has also used them interchangeably in these reasons, using one or the other depending on the reference made in the RFP or by a

Exhibit PR-2015-048-09, Exhibit 1, Vol. 1A.

- Maintain a method for analyzing [non-conformance] data and initiating corrective and preventative action;
- Ensure all corrective action is recorded and effectively implemented to improve their practices;
- Control all documentation related to their practices;
- Continually review and audit their practices to ensure they adhere with accepted standards;
- Manage and monitor the performance of their sub-contractors;
- Ensure their rnanagement reviews the findings of any evaluation or audit to assist with continuous improvement, including the findings of any evaluation conducted by FMF Cape Scott:
- Manage employee awareness and competence through certification and training as part of process management.
- 9. Finally, Part 7 of the RFP contains clauses and conditions intended to form part of the resulting contract at the end of the solicitation process. Both parties have made references to certain provisions in Part 7; thus, for ease of reference in the ensuing reasons, the Tribunal has reproduced those provisions below:

#### 7.8 Certifications

Compliance with the certifications provided by the Contractor in its bid is a condition of the Contract and subject to verification by Canada during the term of the Contract. If the Contractor does not comply with any certification or it is determined that any certification made by the Contractor in its bid is untrue, whether made knowingly or unknowingly, Canada has the right, pursuant to the default provision of the Contract, to terminate the Contract for default.

. .

#### 7.15 ISO 9001:2000 – Quality Management Systems

In the performance of the Work described in the Contract, the Contractor must comply with the requirements of:

ISO 9001:2000 - Quality management systems - Requirements, published by the International Organization for Standardization (ISO), current edition at date of submission of the Contractor's bid with the exclusion of the following requirement:

#### 7.3 Design and development

It is not the intent of this clause to require that the Contractor be registered to the applicable standard; however, the Contractor's quality management system must address each requirement contained in the standard.

#### **BACKGROUND**

- 10. Dominion submitted a bid dated November 19, 2015.
- 11. On November 30, 2015, PWGSC awarded the resulting contract to RMI Marine Ltd. (RMI) as, according to PWGSC, it had proposed a responsive bid with the lowest evaluated price.
- 12. On December 3, 2015, Dominion requested a debriefing of the results of the bid solicitation.

9. *Ibid*.

<sup>8.</sup> Ibid.

- 13. On December 4, 2015, PWGSC responded to Dominion, indicating that two bids had been received, providing the total amount of RMI's financial bid and indicating that RMI had met all the conditions of the solicitation. On the same day, Dominion objected in writing to PWGSC with regard to the award of the resulting contract, asserting that RMI was not an ISO-registered company, making its bid non-compliant.
- 14. On December 7, 2015, PWGSC responded in writing to Dominion, indicating that the RFP provided for an alternative to the ISO requirement and that RMI had provided proof, to the satisfaction of DND, that it met that alternative.
- 15. Dominion then sent a second written objection to PWGSC on December 14, 2015, before filing this complaint with the Tribunal on December 21, 2015. 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 December 29, 2015.
- 16. On January 29, 2016, PWGSC filed its Government Institution Report (GIR) with regard to the complaint.
- 17. On February 9, 2016, Dominion filed its comments on the GIR.
- 18. 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**

- 19. In responding to the complaint, PWGSC made the assertion that ISO registration was not a requirement of the RFP. Instead, PWGSC argued that the RFP "... provided that a bidder could be either ISO 9001:2000 certified or provide documentation and procedures that satisfied a quality system evaluation." <sup>10</sup>
- 20. In support of its position, PWGSC asserted that clause 5.2(6) of the RFP, which requires "ISO 9001 registration documentation as per Part 6.7", must be read in conjunction with clause 6.7, which provides bidders with two options with regard to satisfying the requirement in clause 5.2(6)—either documentation demonstrative of ISO 9001:2000 registration or subjection to a quality system evaluation by a Quality Assurance Authority. According to PWGSC, a bidder's requirements with regard to a quality management system are set out in clause 1.5 of Annex F to the RFP. <sup>11</sup>
- 21. PWGSC explained that RMI "... did not state on its bid that it was ISO registered"; rather, RMI stated "... that it had a Quality Management System in place." The documentation pertaining to that quality management system was filed as a confidential exhibit to PWGSC's GIR.
- 22. PWGSC further explained that, pursuant to the second of the two options set out in clause 6.7 of the RFP, the evaluation of RMI's quality management system was undertaken by DND's "... Management

<sup>10.</sup> *Ibid.* at para. 3.

<sup>11.</sup> *Ibid.* at para. 22.

<sup>12.</sup> *Ibid.* at para. 27.

Systems Office, Fleet Maintenance Facility Cape Scott . . . "13, at the end of which the Acting Management Systems Supervisor of that office advised that ". . . his 'office has reviewed the QA documents . . . provided from RMI Marine in regards to the subject solicitation and have found their quality management system acceptable." 14 It is the PWGSC's position that DND's Management Systems Office constituted the Quality Assurance Authority referenced in clause 6.7 and, further, that the authority ". . . reasonably determined that RMI Marine's quality management system satisfied the mandatory requirement." 15

- 23. Next, PWGSC argued that jurisprudence supports the proposition that its reading of the relevant clauses of the RFP, and its resulting evaluation of RMI's bid, should not be set aside. Specifically, making reference to File Nos. PR-99-020<sup>16</sup> and PR-2013-044,<sup>17</sup> PWGSC asserted that it bore an onus to evaluate the conformity of bidders to mandatory requirements of the RFP thoroughly and strictly. Further, making reference to File Nos. PR-2012-012<sup>18</sup> and PR-2011-043,<sup>19</sup> among others, PWGSC asserted that its evaluation should be accorded a large measure of deference and that the standard of review applicable to that evaluation should be "reasonableness", with a reasonable evaluation being one that is supported by a tenable explanation, even if that explanation is not one that the Tribunal itself finds compelling.
- 24. Lastly, PWGSC argued that Dominion's bid was not compliant with a different mandatory requirement of the RFP, regarding the holding of a valid organization security clearance pursuant to clause 6.1 of the RFP. <sup>20</sup> As a result, in PWGSC's words, "... the Complainant would not have been eligible for contract award and, on this basis, the Complainant's requested remedy that it be awarded the contract cannot be granted." PWGSC submitted that, since Dominion's bid was not compliant, should the Tribunal determine that Dominion's complaint is valid, a new procurement must be the ordered remedy. <sup>22</sup>
- 25. PWGSC sought costs in accordance with the Tribunal's *Procurement Costs Guideline* (the *Guideline*).

#### **Dominion**

26. For its part, Dominion argued that PWGSC's evaluation of RMI's bid was unreasonable, in that it contained two of the reviewable errors which, as stated by the Tribunal, are grounds for interfering with procurement evaluations. First, the evaluators wrongly interpreted the scope of a requirement and, second, the evaluators based their evaluation on undisclosed criteria.<sup>23</sup>

<sup>13.</sup> *Ibid.* at para. 29.

<sup>14.</sup> *Ibid.* at para. 29.

<sup>15.</sup> *Ibid.* at para. 4.

<sup>16.</sup> IBM Canada Ltd. (5 November 1999) (CITT).

<sup>17.</sup> Valcom Consulting Group Inc. v. Department of Public Works and Government Services (9 July 2014) (CITT).

<sup>18.</sup> Samson & Associates v. Department of Public Works and Government Services (19 October 2012) (CITT) [Samson].

<sup>19.</sup> Excel Human Resources Inc. v. Department of the Environment (2 March 2012) (CITT).

<sup>20.</sup> Clause 6.1 of the RFP provides as follows: "At the date of bid closing, the following conditions must be met:

(a) the Bidder must hold a valid organization security clearance as indicated in Part 7 – Resulting Contract Clauses: . . . ."

<sup>21.</sup> Exhibit PR-2015-048-09 at para. 5, Vol. 1A. In this regard, PWGSC noted, in paragraph 16 of the GIR, that it issued an amendment to the RFP on November 6, 2015, adding a Security Requirements Check List. Further, PWGSC asserted that, in keeping with jurisprudence, the onus is on a bidder to demonstrate compliance with mandatory requirements.

<sup>22.</sup> Exhibit PR-2015-048-09 at para. 12, Vol. 1A.

<sup>23.</sup> *Samson* at paras. 26-27.

- 27. Concerning the first reviewable error, Dominion asserted that "...PWGSC wrongly interpreted the scope of the RFP's quality management requirements, reading in a standard for alternative compliance which is not provided for in the RFP." In relation to this assertion, Dominion argued that the possession of documentation pertaining to a quality system, as set out in the second paragraph of clause 6.7 of the RFP, is "... but one documentary element of the ISO 9001:2008 standard ... as opposed to full compliance with the standard". In addition, Dominion argued that the word "must" is used in the first paragraph of clause 6.7 with regard to the provision of ISO registration documentation and that the word "must" is an "... imperative requirement which affords no choice or discretion."
- 28. Concerning the second reviewable error, Dominion asserted that the checklist set out within clause 1.5 of Annex F to the RFP does not address each requirement in the ISO 9001 standard and that this failure to fully set out the requirements of the ISO standard constituted or enabled the use of undisclosed criteria in the evaluation of the bids.<sup>27</sup>
- 29. By way of a second argument, Dominion referred to an earlier position taken by PWGSC when it denied relief to Dominion. PWGSC relied on clause 7.15 of the RFP, contained within the resulting contract portion of the RFP, to make the point that RMI had complied with an alternative to the ISO standard. However, in its GIR, PWGSC did not indicate that it continued to rely on clause 7.15. Addressing the matter, Dominion asserted that a resulting contract clause should not be used as an aid to the interpretation of a requirement applicable to the tendering process.<sup>28</sup>
- 30. However, in outlining a third argument, Dominion itself proceeded to rely on clause 7.15 of the RFP. As an alternative to its earlier argument, Dominion took the position that, if ISO 9001 was not an immutably required standard of the solicitation, such that alternative compliance was permitted, pursuant to clause 7.15, "... the Contractor's quality management system <u>must</u> address <u>each requirement</u> contained in the [ISO 9001] standard ...." Dominion asserted that, contrary to this requirement, RMI failed to meet each requirement contained in the ISO 9001 standard and did not in fact purport to do so in its bid, as submitted to PWGSC.
- 31. In addition, Dominion asserted that, in evaluating the quality management system documentation included in RMI's bid, PWGSC's assessment was limited to the checklist set out within clause 1.5 of Annex F to the RFP.<sup>30</sup> Dominion contended that clause 1.5 of Annex F only sets out minimum required processes that a bidder's quality management system should include, such as analysis of data, corrective action and preventative action, among others, while "[o]ther significant areas such as purchasing, managing to quality objectives, calibration and maintenance,...and others, are not addressed...."

  Thus, according to Dominion, a quality management system evaluation premised solely on that clause would be inadequate, as it would not gauge compliance with the full range of processes covered by ISO 9001, as required by clause 7.15 of the RFP.

<sup>24.</sup> Exhibit PR-2015-048-11 at para. 2(i), Vol. 1A.

<sup>25.</sup> *Ibid.* at para. 2(ii)(a). Dominion also makes the alternative argument in paragraph 11 that the second paragraph of clause 6.7 of the RFP refers to those quality management systems that are not covered by the ISO standard.

<sup>26.</sup> Exhibit PR-2015-048-11 at para. 8, Vol. 1A. Dominion asserts, in this regard, that the Tribunal should be guided by section 11 of the *Interpretation Act*, R.S.C., 1985, c. I-21, which provides that the expression "shall" is to be construed as imperative and the expression "may" as permissive.

<sup>27.</sup> Exhibit PR-2015-048-11 at para. 2(ii)(b), Vol. 1A.

<sup>28.</sup> *Ibid.* at para. 13. In denying relief to Dominion, PWGSC mistakenly referred to clause "7.5".

<sup>29.</sup> Exhibit PR-2015-048-11 at para. 17, Vol. 1A.

<sup>30.</sup> *Ibid.* at paras. 28, 34.

<sup>31.</sup> *Ibid.* at para. 32.

- 32. Setting out a fourth argument, Dominion took the position that the second paragraph of clause 6.7 of the RFP requires the appointment of a "Quality Assurance Authority" and that, as the RFP did not appoint such an authority, the Tribunal must deem that PWGSC did not intend to rely on that provision and, as such, did not intend to create an alternative option with regard to meeting the requirement in clause 5.2(6).<sup>32</sup>
- 33. By way of a fifth argument, Dominion contended that the evaluation of RMI's quality management system by DND's Management Systems Office, which Dominion characterized as undertaken solely by that office's Acting Management Systems Supervisor, should be set aside by the Tribunal for a number of reasons. Dominion argued, firstly, that PWGSC did not disclose the process, if any, followed in undertaking the evaluation, secondly, that there is no evidence that the Acting Management Systems Supervisor possesses the technical knowledge or qualifications to make a valid determination and, thirdly, that the sequence of events leads to the conclusion that the evaluation was undertaken in half a working day, which is insufficient for a comprehensive audit supportive of the conclusion that RMI's quality management system addressed each requirement of the ISO standard.<sup>33</sup>
- 34. In further submissions regarding the position that PWGSC did not disclose the process followed in the evaluation of RMI's quality management system, Dominion argued for reliance on File No. PR-97-008, 34 in which the Tribunal concluded that, while consultants undertaking bid evaluation are expected to apply their professional judgment, that "... does not relieve [the purchaser] from the requirement to provide the basis upon which such judgement was made". 35
- 35. Lastly, as concerns PWGSC's argument that Dominion's bid was, in any event, not compliant with a different mandatory requirement of the RFP, Dominion asserted that this late contention, made by PWGSC in its GIR, constituted a "... breach of Dominion's procedural right to a complete debriefing ..." Further, Dominion argued that, pursuant to section 30.14 of the *CITT Act*, the Tribunal is to limit its considerations to the subject matter of a procurement complaint and that the subject matter in this instance is "... PWGSC's failure to reject RMI's non-compliant bid." In addition, Dominion referenced section 7.40(v)(E) of PWGSC's Supply Manual, which provides that a debriefing will include, among other things, "an outline of the reasons the bid... being debriefed was not successful according to the evaluation criteria and selection methodology." Dominion requested that it be "... entitled to costs for being forced to file a complaint to be informed of an alleged deficiency in its bid."

## TRIBUNAL ANALYSIS

#### **Text of the Solicitation Document**

36. Before commencing its analysis, it is important for the Tribunal to note that the drafting or cobbling together of the RFP in this complaint can readily be described as ponderous, inelegant and, in some instances, ambiguous. The Tribunal must surmise that this played a role in Dominion's decision to file a complaint. Nonetheless, a disinterested reading of the relevant provisions of the RFP reveal that these

<sup>32.</sup> Ibid. at para. 12.

<sup>33.</sup> *Ibid.* at paras. 2(ii)(c), 25, 35.

<sup>34.</sup> Symtron Systems Inc. (10 September 1997) (CITT) [Symtron].

<sup>35.</sup> Exhibit PR-2015-048-11 at para. 36, Vol. 1A.

<sup>36.</sup> *Ibid.* at para. 2(iii).

<sup>37.</sup> *Ibid.* at para. 41.

<sup>38.</sup> https://buyandsell.gc.ca/policy-and-guidelines/supply-manual.

<sup>39.</sup> Exhibit PR-2015-048-11 at para. 2(iii), Vol. 1A.

shortcomings do not rise to what Dominion described as "misleading", 40 such that the Tribunal would be able to conclude that they constituted or enabled the use of undisclosed criteria in the evaluation of the bids.

37. In the following paragraphs, the Tribunal sets out a clause-by-clause examination of the relevant provisions of the RFP. Section II, "Certification Requirements", of clause 3.1 of the RFP, "Preparation Instructions", provides as follows:

Bidders must submit the certifications required in accordance with Part 5. If these certifications do not accompany the bid documents at the time of bid submission, they will be requested by the Contracting Authority as detailed in Part 6.

[Emphasis added]

- 38. The word "must" in the above clause relates to the submission of certifications, rendering submission necessary. The certifications to be submitted are those "... required in accordance with Part 5", rendering both the manner of meeting the requirement and the requirement itself relevant. While submission of the certifications is necessary, it is noteworthy that the timing of that submission is decidedly less categorical—a request by PWGSC, "... as detailed in Part 6", will be made in cases where the certifications do not accompany the bid documents. This renders the manner of the request set out in Part 6 relevant and, further, means that the non-inclusion of the certifications in a submitted bid will not result in a non-responsive bid.
- 39. Next, clause 5.1 of the RFP, "General", provides as follows:

Bidders must provide the required certifications and related documentation to be awarded a contract. Canada will declare a bid non-responsive if the required certifications and related documentation are not completed and submitted as requested.

Compliance with the certifications bidders provide to Canada is *subject to verification by Canada during the bid evaluation period (before award of a contract) and after award of a contract.* The Contracting Authority will have the right to ask for additional information to verify bidders' compliance with the certifications *before award of a contract.* The bid will be declared *non-responsive* if any certification made by the Bidder is untrue, whether made knowingly or unknowingly. Failure to comply with the certifications, to provide the related documentation or to comply with the request of the Contracting Authority for additional information will also render the bid *non-responsive*.

[Emphasis added]

40. The above clause reiterates that submission of the certifications is necessary. As concerns the manner of meeting the requirement, which clause 3.1 of the RFP rendered relevant, the above clause makes clear that submission is a condition precedent to contract award. This also provides some demarcation regarding the timing of submission—while submission is not required at the time of bid submission, the resulting contract cannot be awarded until submission has been made. With regard to the verification of provided certifications, the clause makes clear that it can occur both during bid evaluation and after award of the resulting contract. As PWGSC will have satisfied itself regarding provided certifications prior to contract award, it can reasonably be concluded that any verification undertaken after contract award will be with regard to the maintenance or broadening of those certifications in manners specific to the work detailed in the contract.

<sup>40.</sup> Exhibit PR-2015-048-09 at para. 6, Vol. 1A.

41. Further, clause 5.2 of the RFP, "Certifications Required Precedent to Contract Award", provides as follows:

The certifications listed below *should be* completed and submitted with the bid but *may be* submitted afterwards. If any of these required certifications is not completed and submitted as requested, the Contracting Authority *will so inform* the Bidder and provide the Bidder with a *time frame* within which to meet the requirement. Failure to comply with the request of the Contracting Authority and meet the requirement within that time period will render the bid *non-responsive*.

. .

6. ISO 9001 registration documentation as per Part 6.7

[Emphasis added]

- 42. Iterating the point made in clause 3.1 of the RFP, this clause makes clear that the certifications "should be" submitted with the bid documents but "may be" submitted afterwards—thus, submission with a bid is ideal, but submission subsequent to a bid is permissible. Regarding another point made in clause 3.1, this clause additionally makes clear that a request by PWGSC will be made in cases where the certifications do not accompany the bid documents and, further, that a time frame will be provided within which to comply. In clauses 3.1 and 5.2, the use of the word "will" results in a self-imposed onus by PWGSC. As concerns what is actually required, which clause 3.1 rendered relevant, clause 5.2 uses the phrasing "ISO 9001 registration documentation as per Part 6.7". Thus, an understanding of the nature and ambit of the ISO registration requirement requires a reading of clause 6.7.
- 43. Clause 6.7 of the RFP, "**ISO 9001:2000 Quality Management Systems**", provides as follows:

Before contract award and within 24 hours of written notification by the Contracting Authority the successful Bidder must provide its current ISO Registration Documentation indicating its registration to ISO 9001:2000.

Documentation and procedures of *bidders not registered to the ISO standards* may be subject to a Quality System Evaluation (QSE) by the Quality Assurance Authority *before award of a contract*.

[Emphasis added]

- 44. It is noteworthy that the above clause relates to a "successful Bidder". Read in light of clause 4.2 of the RFP, which indicates that "[a] bid must comply with all requirements of the bid solicitation to be declared responsive", the above clause can only further support the conclusion, reached from clauses examined earlier, that the submission of certifications and, in this specific instance, the ISO certification by bid closing is not a requirement of the bid solicitation, but, instead, that submission is a condition precedent to contract award. In addition, the above clause clarifies that, should the request indicated in clauses 3.1, 5.1 and 5.2 be made by the PWGSC to a successful bidder, the time frame for compliance would be 24 hours. Further, based on a reading of clauses 5.1 and 5.2, as well as the terms of clause 4.2, a successful bidder's responsive bid can be reverted to a non-responsive status prior to contract award if any required certification is not provided upon PWGSC's request or is untrue.
- 45. Perhaps of most importance with regard to the current complaint is the fact that clause 6.7 of the RFP indicates that a successful bidder must provide "its current" ISO 9001 certification and then proceeds to set out an alternative for bidders "... not registered to the ISO standards...." The actual construction "must provide its current" can be set up against the possible but unused construction "must provide a current". While the latter would have communicated an imperative, the former communicates provision conditional on possession. In essence, a reasonable reading of the clause is that a successful bidder with a current ISO 9001 certification must provide one, and bidders generally—including the successful bidder—

that are not registered to ISO standards are to provide, for the purposes of the ISO certification requirement, quality system documentation and procedures, which may be subject to an evaluation by a Quality Assurance Authority.

- 46. Of course, the option of providing quality system documentation and procedures is not explicit in the text of the RFP. Rather, it is inferred from the indication in clause 6.7 of the RFP that, for bidders not registered to ISO standards, those documentation and procedures may be evaluated "... before award of a contract"—that which is to be evaluated must first be provided. In addition, with regard to that evaluation, the use of the construction "may be subject" in the second paragraph of clause 6.7 supports the conclusion that the evaluation is not strictly necessary and that, thus, the result is that a successful bidder with a current ISO 9001 certification is to provide one, but a successful bidder without that certification is to supply documentation and procedures which may, or may not, be evaluated.
- 47. Additionally, the Tribunal notes that, as concerns the submission of the certification in this complaint, the operative wording in the RFP, as set out in clause 5.2(6) of the RFP, is "ISO 9001 registration documentation as per Part 6.7". The construction "registration documentation" is somewhat categorical, in that it suggests the provision of proof related to steps of formal adherence to the ISO 9001 standard. As such, it is poorly aligned with the second paragraph of clause 6.7, which essentially sets out an alternative to those steps of formal adherence. In contrast, a less definitive ISO requirement, one that would have been better aligned with the second paragraph of clause 6.7, might specify "ISO 9001 or similar requirements as per Part 6.7". Nonetheless, in using the construction "as per part 6.7", clause 5.2(6) suggests that the categorical requirement within it must be read pursuant to, and ultimately be mitigated by, clause 6.7.
- 48. Thus, there are clearly ambiguities within portions of the RFP that are relevant to the current complaint. However, as the Tribunal has stated, these ambiguities did not constitute or enable the use of undisclosed criteria in the evaluation of the bids. They also do not support the conclusion that, by relying upon the second paragraph of clause 6.7 of the RFP, PWGSC wrongly interpreted the scope of that or another requirement. It is important to note that the Tribunal's standard of review with regard to procurement complaints concerning evaluation is reasonableness, with a reasonable evaluation being one that is supported by a tenable explanation. Considering the RFP provisions, the conclusion that ISO 9001 was not an immutably required standard of the solicitation is a reasonable one. The opposite conclusion would only be reasonable if the second paragraph of clause 6.7 was entirely absent. That paragraph supports the conclusion that ISO 9001 was simply the most exacting manner in which to achieve the objective of a quality management system. As such, the Tribunal finds that PWGSC's evaluation of RMI's bid was reasonable, as it was based on the tenable explanation that clause 6.7 provided for an alternative to the submission of ISO registration documentation.
- 49. In addition, the Tribunal has opined in past decisions that "... bidders bear the onus to seek clarification of matters considered ambiguous or uncertain." That onus exists regardless of whether the ambiguity engages the bidder's proposal or that of the bidder's competitor. In this instance, Dominion should have sought clarification from PWGSC at the bid submission phase, upon a reading of the ambiguous portions of the RFP. Further, the Tribunal has also indicated, in jurisprudence, that it is "... incumbent upon a bidder that believes that a requirement is unreasonable, to take steps to seek relief

<sup>41.</sup> Info-Electric H P Systems Inc. v. Department of Public Works and Government Services (2 August 2006), PR-2006-012 (CITT) at para. 17; Marathon Watch Company Ltd. (19 May 2010), PR-2010-011 (CITT); Berlitz Canada Inc. (18 July 2003), PR-2002-066 (CITT); Primex Project Management Ltd. (22 August 2002), PR-2002-001 (CITT).

within the time periods prescribed under section 6 of the *Regulations*."<sup>42</sup> Thus, if the clarifications provided by PWGSC did not satisfy Dominion, it should have filed a complaint with the Tribunal in a timely fashion before bid closing rather than read its own limitations into the scope of a requirement. Tender documents that are ambiguous, but sufficiently intelligible to allow for the asking of clarifying questions, will not be deemed by the Tribunal as constituting or enabling the use of undisclosed criteria in the evaluation of bids.

#### **Resulting Contract Clauses**

- 50. The Tribunal notes that Dominion premised a number of its arguments on provisions within the resulting contract clauses contained in Part 7 of the RFP, as well as on clauses contained in Annex F, which the Tribunal must conclude relates to the resulting contract, since it is a statement of "Contractor Requirements" and places obligations on the "Contractor" rather than on bidders. Further, the Tribunal notes that PWGSC premised its denial of relief to Dominion on clause 7.15, which is a resulting contract clause.
- 51. The Tribunal finds it important to note that, unless an indication is made or can reasonably be inferred to the contrary, resulting contract clauses contained within solicitation documents will ordinarily not contain requirements relevant to the bid submission or evaluation phases. Thus, with specific regard to clause 7.15 of the RFP, which provides for ISO requirements with which the contract awardee must comply "[i]n the performance of the Work described in the Contract . . . ", those requirements do not form part of the bid submission phase. Further, the related indication that, while the contract awardee need not be ". . . registered to the applicable standard . . . ", its quality system must ". . . address each requirement contained in the standard" is only relevant in the context of post-bid contract administration, which is beyond the purview of the Tribunal. <sup>43</sup>
- Nonetheless, as the parties have mingled bid submission phase and resulting contract requirements, the Tribunal is able to briefly note in *obiter* that clause 7.15 of the RFP is reasonably aligned with clause 6.7, such that ISO registration is neither an immutably required standard of the solicitation nor an immutably required standard of contract performance. However, pursuant to clause 7.15, the contract awardee is newly required to address each requirement contained in that standard. Clause 7.15 can readily be compared to clause 1.4 of Annex F to the RFP, which provides that the contract awardee "... shall be responsible for implementing a quality system appropriate to the scope of the work to be performed." Thus, it is reasonable to conclude that the requirement to address each requirement of the ISO standard need not be met at contract execution, but can be implemented before or in tandem with actual contract performance. This line of reasoning is supported by clause 1.5 of Annex F, which lists the "minimum" processes which the contract awardee's quality system should include.<sup>44</sup>

<sup>42.</sup> Global Upholstery Co. Inc. v. Department of Public Works and Government Services (6 July 2009), PR-2008-052 (CITT) at para. 14.

<sup>43.</sup> Albatross Aviation Services (8 April 2005), PR-2004-062 (CITT); Reicore Technologies Inc. (22 September 2009), PR-2009-047 (CITT); Tyco Electronics Canada ULC (21 March 2014), PR-2013-048 (CITT).

<sup>44.</sup> In paragraph 22 of the GIR, PWGSC effectively ties clause 6.7 of the RFP to clause 1.5 of Annex F to the RFP. Although the latter relates to the resulting contract, PWGSC noted that it sets out the minimum requirements for a quality management system and, thus, the yardstick for evaluating the quality system of bidders not registered to ISO standards, pursuant to clause 6.7. In effect, it is plausible to conclude that RMI's quality system was evaluated against clause 1.5 of Annex F. Due to the similarity of language between the two clauses, such an approach to the evaluation is tenable and represents an instance in which it can reasonably be inferred that a resulting contract clause contains requirements relevant to the bid submission and evaluation phases.

#### **Quality Assurance Authority and Related Process**

- As concerns Dominion's argument that the second paragraph of clause 6.7 of the RFP requires the "appointment" of a Quality Assurance Authority, the Tribunal must remark that this is not borne out on the face of the evidence. While clause 6.7 does refer to a Quality Assurance Authority, there is no indication that one must be formally appointed in order to be vested with that title. The Tribunal also rejects Dominion's related assertion that, since such an authority was not appointed, it can be concluded that PWGSC did not intend to rely on the second paragraph of clause 6.7. A procuring government institution is unable to waive mandatory requirements contained in solicitation documents; as such, PWGSC would be unable to simply opt not to rely on such a requirement. Instead, the Tribunal accepts PWGSC's indication that DND's Management Systems Office constituted the Quality Assurance Authority for the purposes of the solicitation.
- 54. Dominion additionally asserted that the evaluation of RMI's quality management system should be set aside by the Tribunal because PWGSC did not disclose the evaluation process and the technical knowledge or qualifications of one possible evaluator and because the evaluation time frame was insufficient. A procuring government institution's obligation is to evaluate bids strictly, using criteria established in the solicitation document. In this instance, the solicitation document indicated evaluation by a Quality Assurance Authority, and that indication was fulfilled. If Dominion considered the solicitation document ambiguous on the matter of the evaluation process for bidders not registered to ISO standards, it bore the onus of seeking a clarification. To invite the Tribunal, in the absence of *prima facie* evidence, to question an evaluation or to question the knowledge or qualifications of DND's Management Systems Office is to invite a fishing expedition. Thus, bearing in mind the Tribunal's standard of review with regard to procurement complaints, the measure of deference that it accords evaluators and the indication by DND's Acting Management Systems Supervisor that the Management Systems Office reviewed RMI's documents and found its quality management system acceptable, the Tribunal sees no reason to set aside the evaluation.
- 55. In support of the above conclusion, the Tribunal notes that the facts in Symtron, which was relied upon by Dominion, can be distinguished from the facts at hand, in that Symtron concerned an investigative procurement in which a consulting firm was hired to gather information and to use its professional judgment in reaching conclusions on the basis of that information. In effect, the Tribunal opined in Symtron that, in the context of an investigative procurement, a procuring government institution was required to provide the basis upon which its consulting firm exercised professional judgment. In a procurement process such as the one at hand, in which there is no self-directed gathering of information by a procuring government institution or its consultant, the exercise of professional judgment is replaced by the requirements set out in the solicitation documents and by the jurisprudential requirement that bids be evaluated against those requirements strictly. Residually, section 7.40(v)(D) of PWGSC's Supply Manual enables an unsuccessful bidder to acquire general information regarding the relative strengths of the successful bid, and section 7.40(v)(E) enables such a bidder to acquire the reasons for which its own bid was unsuccessful.

#### **Procedural Right to a Complete Debriefing**

56. In its last argument, Dominion asserted that PWGSC's late contention that its bid was not compliant with a different mandatory requirement of the RFP constituted a breach of Dominion's procedural right to a complete debriefing in light of section 7.40(v)(E) of PWGSC's Supply Manual. The Tribunal agrees with Dominion on this point. The requirement set out in the Supply Manual is for "an outline of the reasons the bid... of the bidder... being debriefed was not successful according to the evaluation criteria and selection

methodology." The requirement echoes Article 1015(6)(b) of the *North American Free Trade Agreement*, which provides that a procuring government institution shall, "on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender...." The information on file supports the conclusion that PWGSC's briefing of Dominion with regard to its bid fell far short of this requirement.

57. The Tribunal notes that, should PWGSC's assertion that Dominion's bid was not compliant with a different mandatory requirement be true, the outcome of the solicitation would be unchanged, in that RMI would be the successful bidder. Further, should PWGSC's assertion be untrue or premised on an unreasonable evaluation, the outcome of the solicitation would still be unchanged, in that RMI would remain the successful bidder. In addition, the Tribunal notes that Dominion did not assert that it would not have filed this complaint if it had been fully aware of what PWGSC considered to be the shortcomings of its bid. Also, the Tribunal does not agree with Dominion's assertion that it was "... forced to file a complaint to be informed of an alleged deficiency in its bid." Dominion filed its complaint for reasons other than the discovery of this alleged deficiency. Thus, the Tribunal is able to conclude that this breach of Dominion's procedural rights did not result in any pecuniary loss for Dominion. As a result, as a remedy, the Tribunal recommends that PWGSC provide Dominion with a briefing fully in keeping with section 7.40(v)(E) of PWGSC's Supply Manual and Article 1015(6)(b) of *NAFTA* as a complete response to Dominion's request of December 3, 2015.

#### Conclusion

58. In view of the foregoing, the Tribunal finds that the complaint is not valid.

#### **COSTS**

- 59. PWGSC requested that it be awarded its costs incurred in responding to the complaint.
- 60. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.
- 61. In determining the amount of the cost award for this complaint case, the Tribunal considered 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.
- 62. The Tribunal's preliminary indication is that this complaint case has a complexity level corresponding to the middle level of complexity referred to in Annex A of the *Guideline* (Level 2). The procurement was somewhat complex, in that it involved a defined service, with the need to assess bidders against multiple criteria. The complaint was somewhat complex, in that it involved ambiguous specifications. The proceedings were somewhat complex, in that some minor submissions beyond the scope of normal proceedings were entertained.

<sup>45.</sup> 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, online: Department of Foreign Affairs, Trade and Development <a href="http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng">http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng</a> (entered into force 1 January 1994) [NAFTA].

<sup>46.</sup> Exhibit PR-2015-048-11 at para. 2(iii), Vol. 1A.

<sup>47.</sup> For that reason, this complaint differs from Discover Training Inc. (17 May 1999), PR-98-042 (CITT).

63. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,750.

#### **DETERMINATION OF THE TRIBUNAL**

- 64. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.
- 65. 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 Dominion. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. 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 by article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Serge Fréchette

Serge Fréchette Presiding Member