



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-016

Hubspoke Inc.

*Decision made
Tuesday, June 27, 2017*

*Decision issued
Thursday, June 29, 2017*

*Reasons issued
Monday, July 10, 2017*

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

BY

HUBSPOKE INC.

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Rose Ritcey
Rose Ritcey
Presiding Member

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

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. On June 21, 2017, Hubspoke Inc. (Hubspoke) filed this complaint concerning a Request for Proposal (RFP) (Solicitation No. W6369-17-DE12) issued by the Department of National Defence (DND), under the framework of the Supply Arrangement for Task-Based Informatics Professional Services (No. EN578-055605/G). The RFP sought the services of nine professionals in total.

3. Hubspoke's grounds of complaint can be summarized as follows:

- 1) the evaluators unfairly deemed Hubspoke's bid non-compliant by applying an undisclosed, restrictive definition of the concept of "Command Control Communications Computers Intelligence Surveillance and Reconnaissance" (C4ISR);
- 2) the evaluators unfairly deemed Hubspoke's proposal non-compliant on the basis that it did not specify the dates of subcomponents of a project included in one of its proposed resources' experience—a requirement that was not disclosed in the tender documents;
- 3) mandatory criteria requiring that the proposed resources have experience working within a department or agency of the Government of Canada breached article 1015(5) of the *North American Free Trade Agreement*.³

4. On June 27, 2017, the Tribunal decided not to conduct an inquiry into the complaint for the reasons that follow.

PROCUREMENT PROCESS

5. The RFP was issued on March 20, 2017. The amended closing date was April 12, 2017.

6. On May 19, 2017, DND informed Hubspoke that its proposal had not met all the mandatory criteria and that the contract had been awarded to another supplier. DND's letter indicated that Hubspoke's bid had been found to be deficient with respect to the following mandatory criteria:

B.1 Business Analyst – Resource 1

- M1 – The evaluators determined that Project 2 of the résumé did not clearly demonstrate evidence the work was completed in a Command Control Communications Computers

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

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

3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

Intelligence Surveillance and Reconnaissance (C4ISR) environment; therefore the minimum amount of experience required was not met.

- M2 – The evaluators determined that Project 2 of the résumé did not clearly demonstrate evidence the activities completed were in a C4ISR environment.

B.7 Business Transformation Architect – Resource 4

- M1 – The evaluators determined that the résumé did not clearly demonstrate the length of time the proposed resource was working as a Business Transformation Architect in Project 8.

P.8 Project Leader – Resource 1

- M1 – The evaluators determined that Project 2 of the résumé did not clearly demonstrate evidence that the work was completed in a C4ISR Project.

7. The information filed by Hubspoke indicates that e-mails were exchanged between Hubspoke and DND, from May 19 to June 1, 2017. This correspondence concerned the scheduling of a debriefing meeting.

8. In an e-mail to the Tribunal, Hubspoke also indicates that another meeting took place on May 29, 2017. The attendees included representatives of Hubspoke and two DND officials. Hubspoke states that, at this meeting, it “voiced concerns . . . regarding the fairness and conduct of the overall competition and also of the RFP evaluation practices, specifically leading to the disqualification of HubSpoke’s technical response”⁴ Hubspoke also indicates that “DND responded that there was nothing they could do at this point in the process.”

9. On June 7, 2017, the previously scheduled debriefing meeting took place. Hubspoke indicates in its complaint that this is when it “received information about why it was determined that [its] proposal did not meet all the mandatory criteria”.⁵ Specifically, it states that it found out that DND had applied undisclosed criteria in evaluating its bid by applying a narrow definition of C4ISR and by requiring the dates of the subcomponents of Project 8 in one of its proposed resources’ experience to be provided in order to substantiate the duration of that project.

10. Hubspoke indicates that it objected on both of these grounds, and that its objections were dismissed by DND at the same meeting.

11. Hubspoke filed its complaint with the Tribunal on June 21, 2017.

ANALYSIS

12. Pursuant to section 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following four conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;
- the complainant is a potential supplier;
- the complaint is in respect of a designated contract; and
- the information provided discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements.

4. Hubspoke’s e-mail to the Tribunal dated June 26, 2017.

5. Complaint, p. 4.

13. The complaint meets the second and the third conditions. The Tribunal will only address the two remaining conditions.

Is the Complaint Timely?

14. Pursuant to section 6 of the *Regulations*, a potential supplier has 10 working days from the day on which the basis of the complaint becomes known to it, or reasonably should have become known, to either object to the relevant government institution or file a complaint with the Tribunal. Where a potential supplier opts to first make an objection to the government institution, it may file a complaint with the Tribunal within 10 days after the day on which it receives a denial of relief from the government institution. The relevant provisions read as follows:

6 (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

15. The complaint on Ground 3 was filed well outside of the prescribed time limits. Several mandatory criteria included in the RFP required bidders to demonstrate that their proposed resources have experience working within a Government of Canada department or agency.⁶ Thus, the existence of such requirements would have become known to Hubspoke upon reading the RFP, which, at the very latest, would have occurred on April 12, 2017, the closing date of the solicitation. If Hubspoke considered such requirements to be objectionable, it had 10 working days to either make an objection to DND or to file a complaint with the Tribunal. Hubspoke's complaint on this ground, filed on June 21, 2017, is therefore late.

16. As for the remaining two grounds of complaint, which concern the way in which DND evaluated Hubspoke's bid, the Tribunal first notes that the timeline of Hubspoke's actions following the receipt of the May 19, 2017, letter from DND is not entirely clear. In particular, the purpose and significance of the meeting held between Hubspoke and certain DND representatives on May 29, 2017, is unclear, notably as Hubspoke did not explain what role the DND representatives who attended this meeting played in the context of the RFP, nor did it explain the link, if any, between this meeting and the subsequent debriefing meeting held on June 7, 2017. The Tribunal recalls that complainants must provide clear facts and evidence relevant to the complaint.⁷ A failure to file a complaint that is properly documented in all material respects may notably lead to delays and a finding that the complaint was filed outside of the prescribed time limits.

17. Nevertheless, the Tribunal is prepared at this stage to consider the complaint as timely on the basis of the information provided by Hubspoke. In particular, Hubspoke indicates that it only found out at the debriefing held on June 7, 2017, the specific way in which DND had construed the RFP criteria and applied them to Hubspoke's proposal, and which, according to Hubspoke, showed that DND had applied undisclosed evaluation criteria. As such, giving Hubspoke the benefit of the doubt in light of the ambiguities

6. See, in particular, mandatory criterion M1 for each required resource, Attachment 1 to Part 4 of the RFP.

7. Subsection 30.11(2) of the *CITT Act* provides that a complaint must, among other things, "contain a clear and detailed statement of the substantive and factual grounds of the complaint" and "include all information and documents relevant to the complaint that are in the complainant's possession".

of the information included in the complaint, the Tribunal accepts that Hubspoke discovered its two remaining grounds of complaint on June 7, 2017. As it objected to the use of the alleged undisclosed criteria the same day, its objection to DND was timely. Hubspoke's complaint regarding the use of the alleged undisclosed criteria was filed on June 21, 2017, that is, on the 10th working day following the denial of relief from DND on June 7, 2017.

Does the Complaint Disclose a Reasonable Indication of a Breach of the Trade Agreements?

18. The Tribunal will begin the analysis by considering Hubspoke's second ground of complaint. DND's letter dated May 19, 2017, indicates that, with respect to Resource 4 in the category "B.7 Business Transformation Architect", Hubspoke's bid failed with respect to mandatory criterion M1 for the following reason: "The evaluators determined that the résumé did not clearly demonstrate the length of time the proposed resource was working as a Business Transformation Architect in Project 8".

19. Hubspoke alleges in its complaint that during the debriefing of June 7, 2017, it "learned that the evaluation team determined that the dates of the project subcomponents were required to substantiate the duration of Project 8"⁸—a requirement that was not disclosed in the tender documents. Hubspoke argues that it clearly stated the length of time that the resource had worked on Project 8 in its proposal, that is, "from November 2006 through March 2015", and that its bid therefore complied with mandatory criterion M1 with respect to Resource 4.

20. The trade agreements require procuring entities to state the criteria that will be used to evaluate bids and to apply the stated criteria in evaluating the bids.⁹ The Tribunal must therefore determine whether the complaint discloses a reasonable indication that DND failed to evaluate Hubspoke's bid in accordance with the criteria stated in the RFP.

21. The RFP provided as follows, in relevant part:

3.2 SECTION I: TECHNICAL BID

A. The technical bid consists of the following:

...

(iii) Substantiation of Technical Compliance: *The technical bid must substantiate the compliance with the specific articles of Attachment 1 to Part 4, Bid Evaluation Criteria, which is the requested format for providing the substantiation. The substantiation must not simply be a repetition of the requirement(s), but must explain and demonstrate how the Bidder will meet the requirements and carry out the required Work. Simply stating that the Bidder or its proposed solution or product complies is not sufficient. Where Canada determines that the substantiation is not complete, the Bidder will be considered non-responsive and disqualified. The substantiation may refer to additional documentation submitted with the bid*

...

8. Complaint, p. 7.

9. For instance, Articles 1015(4)(a) and (d) of *NAFTA* provide that "(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 . . ." and that "(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation. . . ." Article 506(6) of the *AIT* provides that "[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria."

(v) For Proposed Resources: . . . *The Technical bid must demonstrate that each proposed individual meets the qualification requirements described (including any educational requirements, work experience requirements, and professional designation or membership requirements). With respect to the proposed resources:*

. . .

- (e) *For any requirements that specify a particular time period (e.g., two (2) years) of work experience, Canada will disregard any information about experience if the technical bid does not include the relevant dates (month and year) for the experience claimed (i.e., the start date and end date). Canada will evaluate only the duration that the resource actually worked on a project or projects (from his or her start date to end date), instead of the overall start and end date of a project or a combination of projects in which a resource has participated; and*
- (f) *For work experience to be considered by Canada, the technical bid must not simply indicate the title of the individual's position, but must demonstrate that the resource has the required work experience by explaining the responsibilities and work performed by the individual while in that position. In situations in which a proposed resource worked at the same time on more than one (1) project, the duration of any overlapping time period will be counted only once toward any requirements that relate to the individual's length of experience.*

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

. . .

4.2 TECHNICAL EVALUATION

. . .

B. Mandatory Technical Criteria: Each bid will be reviewed to determine whether it meets the mandatory requirements of the bid solicitation. *Any element of the bid solicitation that is identified specifically with the words “must” or “mandatory” is a mandatory requirement. Bids that do not comply with each and every mandatory requirement will be considered non-responsive and be disqualified.* The Mandatory evaluation criteria are described in Attachment 1 to Part 4, Bid Evaluation Criteria.

. . .

ATTACHMENT 1 TO PART 4

BID EVALUATION CRITERIA

. . .

Mandatory Technical Criteria

The bid must meet the mandatory technical criteria specified below. The Bidder must provide the necessary documentation to support compliance with this requirement.

Bids which fail to meet the mandatory technical criteria will be declared non-responsive. Each mandatory technical criterion should be addressed separately.

. . .

B.7 Business Transformation Architect – Resource 4		
Number	Mandatory Technical Criterion	Bid Preparation Instructions
M1	<p>The Bidder <i>must clearly demonstrate the proposed resource has a minimum of five (5) in the last seven (7) years' experience as a Business Transformation Architect</i> working on Command, Control, Communications, Computers, Intelligence, Surveillance and Reconnaissance (C4ISR) project(s) within a Government of Canada department and/or agency. Each project referenced must be a minimum of six (6) months long. <i>For this evaluation, a project is defined as a temporary initiative within the organization that is established to deliver a unique product, service or result.</i></p> <p>For each referenced project the bidder must provide a valid client reference:</p> <p>Name: Title: Phone #: Email Address:</p>	
...

[Emphasis added]

22. Having regard to the pre-cited criteria, the RFP made it abundantly clear that *substantiation* and *demonstration* of each proposed resources' experience was required. Bidders were asked to provide sufficient substantiation and demonstration to establish the experience of proposed resources both in terms of the length of their experience as well as in terms of the type of experience.

23. Hubspoke's technical proposal indicated that its Resource 4 complied with mandatory criterion M1 through, *inter alia*, its experience on Project 8. In respect of Project 8, the bid indicated the following: "Duration: November 2006 – March 2015 (8 years, 5 months) (5 years within the last 7 years)".¹⁰

24. However, the technical proposal and the resume of Resource 4 also indicated that during this overall timeframe—from November 2006 to March 2015—Resource 4 worked for different clients and in different roles, which are described separately under the umbrella of Project 8. The length of time that Resource 4 worked for each of these clients is not indicated in either the technical bid or the resume submitted with the technical bid. Moreover, as is apparent from the summary included in the technical bid¹¹ as well as from the annotations in the resume of Resource 4, not all of Project 8 is submitted as being experience relevant to mandatory criterion M1 (indeed, some of the roles held by Resource 4 and described under Project 8, for instance "research analyst" or "translator", do not, on their face, appear to constitute experience as a "Business Transformation Architect"). Furthermore, some of the experience described under Project 8 must

10. Hubspoke's technical proposal at p. 33.

11. At pp. 33-34.

have been acquired outside of the timeframe of criterion M1 (i.e. outside of the last 7 years) given that Hubspoke indicated that Project 8 started in November 2006. As such, the bid did not clearly demonstrate and substantiate the length of the resource's experience that was relevant to mandatory criterion M1, and whether that experience was acquired within the timeframe contemplated by criterion M1. In other words, the bid did not clearly demonstrate that the experience of Resource 4 met the minimum experience required under criterion M1.

25. Thus, the Tribunal finds no reasonable indication that DND evaluated the bid on this aspect inconsistently with the published RFP criteria. Contrary to what is alleged by Hubspoke, the failure of its bid to qualify under this criterion is not the result of undisclosed criteria applied by the evaluators, but of the lack of clarity in its bid.

26. As for Hubspoke's first ground of complaint, i.e. that the evaluators unfairly deemed Hubspoke's bid non-compliant with various mandatory criteria as a result of their applying an undisclosed, restrictive definition of the concept of C4ISR, the Tribunal is not convinced that it discloses a reasonable indication of a breach of the trade agreements either. First, as admitted by Hubspoke, the concept of C4ISR was not defined in the RFP. The lack of a definition in the tender documents gave DND a certain latitude in its interpretation and application of the concept when evaluating the bids.

27. Nevertheless, even accepting the premise put forward by Hubspoke that C4ISR is a well-understood concept in the defence domain¹² and that it was authoritatively described in the DND publication on which Hubspoke states that it chose to rely in preparing its bid,¹³ the Tribunal is not convinced that the complaint discloses a reasonable indication that DND evaluated the bids inconsistently with the RFP criteria which refer to C4ISR. Hubspoke states in its complaint that, at the debriefing, "the DND evaluation team told [it] they had used the same publication as their original source for the definition of C4ISR; however, in the process of reviewing the submissions, they decided to apply a more restrictive definition."¹⁴

28. However, Hubspoke provided no further information to support or explain this statement. In particular, Hubspoke did not explain how DND interpreted C4ISR, in what way that interpretation was narrower than the one relied on by Hubspoke or in what way DND's retained definition was unreasonable, according to Hubspoke. It also did not specify why DND's allegedly unfairly narrow definition resulted in its bid being found non-compliant. The bald assertions contained in the complaint thus did not sufficiently show that DND may have applied a definition of C4ISR inconsistent with the published RFP, or even with the DND publication on which Hubspoke relies. As such, the Tribunal is not convinced that the information in the complaint establishes a reasonable indication of a breach of the trade agreements by DND in this respect.

29. In any event, even if the Tribunal had come to the opposite conclusion concerning the reasonable indication of a breach in respect of DND's application of mandatory criteria referring to C4ISR, the Tribunal would nevertheless remain of the view that an inquiry into the complaint should not be initiated. Given that there is no reasonable indication that DND breached the trade agreements in concluding that

12. Complaint, p. 7.

13. The publication in question, filed with the complaint, is entitled "The CAF C4ISR Strategic Vision, Goals and Objectives", and appears to emanate from the Vice Chief of the Defence Staff. The foreword indicates, as Hubspoke points out, that this document "represents authoritative VCDS capability development guidance for all Defence Team members working within the C4ISR domain."

14. Complaint, p. 7.

Hubspoke's bid failed to clearly demonstrate the experience of Resource 4 on Project 8 with respect to mandatory criterion M1, any inquiry into the complaint would essentially be moot. Indeed, the RFP required that proposals comply with *all* mandatory criteria. As such, Hubspoke's proposal was properly disqualified on this basis alone. Therefore, an inquiry into DND's application of other evaluation criteria would, in the circumstances, amount to an exercise of limited theoretical value and of no practical impact.¹⁵ The Tribunal would not have initiated an inquiry in such circumstances.

DECISION

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

Rose Ritcey

Rose Ritcey
Presiding Member

15. Pursuant to subsections 30.13(1) and 30.13(5) of the *CITT Act* and subsection 7(2) of the *Regulations*, the decision to initiate an inquiry, even where the prescribed conditions for initiation are met, remains within the Tribunal's discretion. See also *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48 (CanLII).