



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-062

SoftSim Technologies Inc.

*Decision made
Thursday, March 15, 2018*

*Decision issued
Monday, March 19, 2018*

*Reasons issued
Tuesday, March 20, 2018*

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

SOFTSIM TECHNOLOGIES INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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.

SUMMARY OF RFP AND COMPLAINT

2. SoftSim Technologies Inc. (SoftSim) filed this complaint on March 9, 2018, regarding a Request for Proposal (Solicitation No. W6381-180013/A) (RFP) issued on February 19, 2018, by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for contracts against a supply arrangement for task-based informatics professional services (TBIPS).

3. The RFP is for the provision of eight resources (various information technology positions) at level 2 or 3 under the TBIPS supply arrangement on an as-needed basis.³

4. SoftSim's first ground of complaint is as follows. The RFP requires bidders to be qualified in all eight resource categories in order to be eligible to bid on the RFP. SoftSim claims that it is not eligible to bid on the RFP because it does not meet the experience requirement for one resource: the IT Security Analyst. SoftSim claims that the seven other resource categories logically relate to software development, but that the IT Analyst position does not. SoftSim alleges that an improper motive of excluding smaller businesses lies behind PWGSC's decision to group the IT Security Analyst resource with the other resources. It submits that IT security is a very specialized area that can be better addressed in a separate RFP. As such, it argues, DND should allow bidders to bid on one or more work streams instead of including this distinct resource with the rest.

5. SoftSim's second ground of complaint is as follows. In a predecessor solicitation, SoftSim won the work for the positions of P.2 Enterprise Architect Level 3 and I.4 Data Modeller, which it has provided for the last three years. Its current contract continues until September 30, 2019, with a one-year option remaining. In November 2017, according to SoftSim, DND stopped using the services of SoftSim's I.4 Data Modeller, claiming that it no longer needed them but in fact, SoftSim alleges, being motivated by a bias for larger suppliers. DND then issued this RFP on February 19, 2018, including the I.4 Data Modeller position as a requirement.

6. As a remedy, SoftSim requests that the RFP be revised to allow it to bid on the resource categories for which it has the requisite experience, and that DND be prohibited from assigning work under the new RFP for positions SoftSim already supplies as the incumbent under its current contract.⁴

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

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

3. The eight resources are A.1 Application/Software Architect (SAP); A.7 Programmer/Analyst (SAP); A.7 Programmer/Analyst (Oracle or Mobile or Microsoft Solutions); B.14 Technical Writer; C.3 IT Security TRA & C&A Analyst; I.4 Data Modeller/IM Modeller; P.2 Enterprise Architect Level 2; and P.2 Enterprise Architect Level 3.

4. In its correspondence with PWGSC, SoftSim also requested that it be permitted to bid as a joint venture with another company that is eligible to supply the C.3 position. However, SoftSim did not identify this as a ground of

ANALYSIS

7. To initiate an inquiry, the Tribunal must find that (a) the complainant is a potential supplier, (b) the complaint is in respect of a designated contract and (c) the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements,⁵ which in this instance are the *North American Free Trade Agreement*,⁶ the *Revised Agreement on Government Procurement*⁷ and the *Canadian Free Trade Agreement*.⁸ The complaint must also be filed within the prescribed time limits.⁹

8. For the reasons provided below, the Tribunal finds that the first ground of complaint is premature because SoftSim has not yet received an answer from PWGSC regarding the objection that it filed in that regard. The Tribunal finds that the second ground is untimely; but even if it had been timely, the Tribunal finds that it does not involve a breach of the trade agreements but rather is a matter of contract administration outside of the Tribunal's jurisdiction. Accordingly, the Tribunal will not initiate an inquiry into the complaint.

Ground 1

9. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "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."

10. Subsection 6(2) of the *Regulations* states that a potential supplier who has made an objection 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."

11. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant will have 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

complaint in its complaint form with the Tribunal. Regardless, it is likely now untimely, as PWGSC first rejected the request by e-mail on March 2, 2018. In any case, even if it is timely, there are no reasons expressed in the complaint or attached correspondence articulating why this request should be considered a breach of any trade agreement.

5. Subsection 7(1) of the *Regulations*.

6. *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*].

7. *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014).

8. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

9. Section 6 of the *Regulations*.

12. The RFP was issued on February 19, 2018.¹⁰
13. On February 20, 2018, SoftSim e-mailed PWGSC to ask whether it had to be qualified for all of the resources to submit a bid. PWGSC responded the same day by e-mail, stating the following:

As stated in the RFP at article 1.2 (i) Only TBIPS SA Holders currently holding a TBIPS SA for Tier 2, in the National Capital Region (NCR) **and Resource Category** under the EN578-170432 series of SAs are eligible to compete.

[Emphasis in original]

14. SoftSim wrote back the same day, objecting that
- [t]he clause does not say that you must cover all of the resource categories. We cover all of them except 1. In other RFPs it clearly states that the bidder must be qualified for all of the resources categories to be able to bid. This one does not and we are assuming that we can bid all of the other categories. Please clarify.
15. PWGSC published the first amendment to the RFP on February 21, 2018, which contained Q&As and one amendment (to article 1.2). Questions 1 and 2 are relevant to the requirement at issue; they read as follows:¹¹

Question #1:

I am enquiring if there is an incumbent in place on this contract. Would the selected company need to supply the entire team of proposed resources?

Answer #1:

There is an incumbent in place for only two resource categories, P.2 Enterprise Architect and I.4 Data Modeller/IM Modeller. The company would need to supply the **resource categories** specified in RFP on an as-and-when-required basis.

Question #2:

Is it mandatory to be qualified under all of the categories to be able to submit a bid? There seem to be several streams and we cover all streams except the one that contains the category C.3.

Answer #2:

Please refer to **amended Article 1.2 (i)** detailed in Appendix A-1 below. **Resources Categories** required for this requirement are listed at article 1.2 – Summary, (k) of the RFP.

[Emphasis added]

16. The amended article 1.2(i) reads as follows:
- Only TBIPS SA Holders currently holding a TBIPS SA for Tier 2, **in the Resource Categories** and in the National Capital Region (NCR) under the EN578-170432 series of SAs are eligible to compete.

[Emphasis in original]

10. RFP at 1, online at: https://buyandsell.gc.ca/cds/public/2018/02/19/782246a48d86fea8af1a7c1d4115a855/ABES.PROD.PW_IPS.B005.E32206.EBSU000.PDF

11. Amendment 1 at p. 1 of 3, online at: https://buyandsell.gc.ca/cds/public/2018/02/21/c778a6d02f90736dd80c5830967663a6/ABES.PROD.PW_IPS.B005.E32206.EBSU001.PDF.

17. On March 2, 2018, SoftSim e-mailed PWGSC with a copy of an e-mail that it had sent to DND, which included the following question: “We are asking DND to allow companies to bid on one or more” resources. On the same day, PWGSC responded by e-mail as follows:

the posted RFP clearly indicates that bids will only be accepted from TBIPS SA Tier 2 suppliers that are qualified to provide services for all the requested resource categories in the NCR. . . . Based on the above stated requirement, I do not see eVision or SoftSim Technologies in Joint Venture as qualified suppliers for this requirement.

18. Later the same day, SoftSim e-mailed PWGSC again, reiterating its request that the requirement be broken down into multiple streams and asking whether companies that can jointly provide all the resources would be accepted as bidders.

19. On March 5, 2018, PWGSC acknowledged receipt of SoftSim’s e-mails and indicated that all questions and answers would be posted on buyandsell.gc.ca.

20. In the fourth amendment to the RFP issued March 8, 2018, PWGSC presented SoftSim’s questions and responded as follows:¹²

Question #33:

Is it possible to break down this requirement to multiple streams in order to provide the crown with the best options possible?

Answer #33:

The answer #33 will be provided in the next solicitation amendment.

Question # 34:

If two companies team up to respond to this requirement and each of them is already pre-qualified under TBIPS Tier 2 and together they cover all of the resource categories of TBIPS Tier 2, would that be acceptable?

Answer #34

Joint ventures interested in submitting a bid for this solicitation must be already qualified under the SA #EN578-170432 as that joint venture and have its own unique SA number.

21. The complaint was filed on March 9, 2018.

22. The first ground of complaint, reflected in SoftSim’s request at Question No. 33, is premature. PWGSC answered SoftSim’s initial question about the interpretation of the RFP on February 21, 2018. However, SoftSim then formally requested on March 2, 2018, that the RFP be revised. Per Question No. 33 in Amendment No. 4, PWGSC has taken that under advisement. PWGSC has not published any subsequent amendment or followed-up on Answer No. 33, so it is not yet known whether PWGSC will grant the complainant’s request or not. As such, SoftSim has not yet received a denial of relief from the government institution, as contemplated by subsection 6(2) of the *Regulations*.

23. The Tribunal’s decision does not preclude SoftSim from filing a new complaint in regards to the first ground of this complaint within 10 working days of receiving a denial of relief from PWGSC relating to its request found at Question No. 33 in Amendment No. 4 of the RFP (discussed further below). Alternatively, if PWGSC fails to answer Question No. 33 within 10 working days of the issuance of these reasons, SoftSim may file a complaint with the Tribunal within 10 working days following the expiration of

12. Amendment 4 at p. 9 of 13, online at: https://buyandsell.gc.ca/cds/public/2018/03/08/1ecf812c6225d6c704f826a636382cc4/ABES.PROD.PW_IPS.B005.E32206.EBSU004.PDF. As noted above, SoftSim did not include the issue of joint ventures as a ground of complaint in its complaint to the Tribunal.

this time limit, and the Tribunal will then decide whether or not to initiate an inquiry. In order to avoid unnecessary duplication, upon filing a new complaint form, SoftSim may request that the documentation already filed with the Tribunal be joined to the new complaint.

Ground 2

24. Regarding the second ground of complaint (that the RFP is improperly impinging on the incumbent contract), the only evidence of SoftSim ever raising this objection with PWGSC after the RFP was published are e-mails dated March 7, 2018, from SoftSim to the Office of the Procurement Ombudsman (OPO) copied to PWGSC that reference an agreement, which PWGSC will propose to DND, to remove the resource categories in the incumbent contract from the RFP in exchange for SoftSim abandoning its complaints before the OPO and the Tribunal.

25. The tenth working day after February 19, 2018, is March 5, 2018. Therefore, the second ground of complaint is untimely.¹³

26. In any event, the Tribunal finds that the second ground of complaint concerns a matter of contract administration that is outside of the Tribunal's bid protest jurisdiction. Any purported right to work that SoftSim believes ought to be performed under Contract No. W6381-150009/001/XT, which followed Solicitation No. W6381-150009/B, is a matter of contract dispute. For example, the Tribunal notes that the contract contains a minimum work guarantee clause.¹⁴ Any dispute surrounding that clause or any other right flowing from that contract is a matter of contract administration, to which the Tribunal's jurisdiction does not extend.¹⁵ This ground of complaint involves a matter of contract dispute, not a question of whether any of the trade agreements have been violated. Therefore, the Tribunal finds that the second ground of complaint does not disclose a reasonable indication of a breach of any trade agreement.

DECISION

27. 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

13. Although there is an earlier e-mail on the chain from the OPO to SoftSim dated March 5, 2018, there is no evidence that this objection was ever filed directly with PWGSC or even that PWGSC was copied on this correspondence.

14. "Canada's obligation under the Contract is to request Work in the amount of the Minimum Contract Value or, at Canada's option, to pay the Contractor at the end of the Contract . . . In the event that Canada does not request work in the amount of the Minimum Contract Value during the Contract Period, Canada must pay the Contractor the difference between the Minimum Contract Value and the cost of the Work performed." Solicitation No. W6381-150009/B at art. 7.3(b) and (c), online at: https://buyandsell.gc.ca/cds/public/2015/06/26/614d09cf653a07b4b4e1e3831ffab5f5/ABES.PROD.PW__XT.B006.E29290.EBSU000.PDF.

15. See *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT) at 7 ("As a preliminary matter, the Tribunal notes that the question of the appropriateness of HRDC's decision not to exercise its option to continue using Eurodata's services is, in the circumstances, a contract administration issue, which does not fall within the Tribunal's bid protest jurisdiction."); see also *Microsoft Canada Co.* (12 March 2010), PR-2009-056 (CITT) at para. 51 (option involves contract administration).