



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2017-063

Renaissance Aeronautics
Associates Inc. (d.b.a. Advanced
Composites Training)

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, May 28, 2018*

TABLE OF CONTENTS

DETERMINATION..... i

STATEMENT OF REASONS 1

 SUMMARY OF COMPLAINT 1

 PROCUREMENT PROCESS..... 1

 PROCEEDINGS OF THE COMPLAINT..... 3

 ANALYSIS..... 3

 The Alleged Unfairness of Mandatory Technical Criterion M2 b) 4

 The Alleged Bias in Favour of the Successful Bidder 6

 The Debriefing Provided by PWGSC 6

 Conclusion of the Complaint Analysis 7

COSTS..... 7

DETERMINATION OF THE TRIBUNAL..... 7

IN THE MATTER OF a complaint filed by Renaissance Aeronautics Associates Inc. (d.b.a. Advanced Composites Training) 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

**RENAISSANCE AERONAUTICS ASSOCIATES INC. (d.b.a.
ADVANCED COMPOSITES TRAINING)**

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.

The Canadian International Trade Tribunal determines, as a preliminary indication, that it will not award costs in this matter. If the Department of Public Works and Government Services disagrees with the preliminary indication regarding costs, it may make submissions to the Canadian International Trade Tribunal, as contemplated in Article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award, if any.

Serge Fréchette
Serge Fréchette
Presiding Member

Tribunal Panel: Serge Fréchette, Presiding Member

Support Staff: Laura Little, Lead Counsel
Sarah Perlman, Counsel

Complainant: Renaissance Aeronautics Associates Inc. (d.b.a.
Advanced Composites Training)

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clark
Ian McLeod
Roy Chamoun
Kathryn Hamill

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
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 March 16, 2018, Renaissance Aeronautics Associates Inc. (d.b.a. Advanced Composites Training) (RAA/ACT) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ regarding a Request for Proposals (RFP) (Solicitation No. W6570-17ATT1/B) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of Aircraft Advanced Composite Repair courses.²
2. On March 22, 2018, the Tribunal decided to conduct an inquiry into the complaint, having determined that it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³
3. The Tribunal inquired into the complaint, as required under sections 30.13 to 30.15 of the *CITT Act*.
4. For the following reasons, the Tribunal finds that the complaint is not valid.

SUMMARY OF COMPLAINT

5. RAA/ACT alleged that PWGSC erred in determining that its proposal was non-compliant with four of the mandatory technical criteria of the RFP, namely, mandatory criteria M2 – Compliance with Certification requirements, M3 – Training Location, Facilities and Equipment, M4 – Aircraft Advanced Composite Repair Course, and M5 – Student to Instructor Ratio. According to RAA/ACT, its proposal should have been found to be responsive to those mandatory requirements and was, therefore, improperly deemed non-responsive. It further alleged that the successful bidder, École nationale d'aérotechnique – cégep Édouard-Montpetit (ENA), had an unfair advantage on the basis that it is a government-funded community college. RAA/ACT also took issue with PWGSC's "severe delays" in providing a debriefing.
6. As a remedy, RAA/ACT requested that the award to ENA be terminated and that a new solicitation be issued for this requirement.

PROCUREMENT PROCESS

7. The RFP was issued by PWGSC on September 12, 2017, with a closing date of September 20, 2017, 2:00 p.m. (CDT). The closing date was later extended to September 28, 2017, at 2:00 p.m.⁴
8. On the RFP closing date, PWGSC had received two bids, one from RAA/ACT and one from ENA, a Quebec general and vocational college (CEGEP).
9. The technical evaluation was conducted and completed between October 16 and 19, 2017. Based on the evaluation results, RAA/ACT's bid was determined to be non-compliant with the mandatory technical criteria of the RFP, namely, M2 through M5.

-
1. R.S.C. 1985, c. 47 (4th Supp.) [*CITT Act*].
 2. RAA/ACT initially filed a deficient complaint on March 13, 2018. On March 16, 2018, RAA/ACT filed additional information further to a request made by the Tribunal on March 14, 2018, pursuant to subsection 30.12(2) of the *CITT Act*. Therefore, in accordance with rule 96(1)(b) of the *Canadian International Trade Tribunal Rules*, SOR/91-499 [*Rules*], and subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed on March 16, 2018.
 3. SOR/93-602 [*Regulations*].
 4. RFP, Amendment 1 (Exhibit PR-2017-063-12, Vol. 1A at 78 of 226).

10. The contracting authority subsequently prepared a draft regret letter to RAA/ACT on November 7, 2017; however, due to an administrative oversight the letter was not sent.⁵ The contracting authority called RAA/ACT on November 10, 2017, to follow up on the regret letter only to discover that it had not been received by RAA/ACT. As a result, the contracting authority explained to an executive assistant at RAA/ACT that its “bid had been found non-compliant and that the contract would not be awarded to their firm.”⁶ The contracting authority also offered RAA/ACT a debriefing to address any concerns or questions from RAA/ACT. At this point, no contract had been awarded.

11. On December 8, 2017, the President of RAA/ACT emailed PWGSC to request information on the status of the procurement. The contracting authority replied that he would provide the results of the solicitation the following week.⁷ That did not occur as the contracting authority suffered a medical issue in mid-December and was absent until January 2, 2018, when he returned to work part-time and was able to continue working on the procurement results.⁸

12. On January 15, 2018, the contract was awarded to ENA and a notice of contract award was published on Buyandsell.gc.ca.⁹

13. On January 18, 2018, the President of RAA/ACT requested a debriefing and the contracting authority proposed a call the next day, which did not take place. After a few more unsuccessful attempts to schedule a debriefing in January and February 2018, RAA/ACT emailed the contracting authority on March 2, 2018, to once again request a debriefing, and indicated that RAA/ACT had a meeting scheduled with the Office of the Procurement Ombudsman to discuss the matter on March 7, 2018. The same day, the contracting authority replied to RAA/ACT with a written bid submission debriefing document, which indicated that RAA/ACT’s bid was determined to be non-responsive as it did not meet mandatory technical criteria M2, M3, M4 and M5.¹⁰

14. On March 3, 2018, RAA/ACT emailed the contracting authority, objecting to the lack of details or explanation in the debriefing document regarding the determination that RAA/ACT’s bid was non-compliant with criteria M2 through M5, and questioning the fairness of a public procurement process that involves private sector entities bidding against government-funded entities for the lowest price.¹¹

15. On March 7, 2018, the contracting authority held a further debriefing with RAA/ACT by telephone and confirmed its non-compliance determination. At that time, the contracting authority further detailed how RAA/ACT’s bid submission was non-compliant with the four mandatory criteria at issue.¹² It was during this call that, according to RAA/ACT, the contracting authority made a statement that community colleges were often awarded training contracts if they were not performing well.¹³ RAA/ACT followed up that call with an email to the contracting authority, in which it reiterated its objection.

5. PWGSC, GIR at para. 25 and Exhibit 11 (Exhibit PR-2017-063-12, Vol. 1A at 16 of 226).

6. PWGSC, GIR at para. 26 (Exhibit PR-2017-063-12, Vol. 1A at 17 of 226).

7. PWGSC, GIR, Exhibit 13 (Exhibit PR-2017-063-12, Vol. 1A at 184-185 of 226).

8. PWGSC, GIR at para. 28 (Exhibit PR-2017-063-12, Vol. 1A at 17 of 226).

9. PWGSC, GIR at para. 29 (Exhibit PR-2017-063-12, Vol. 1A at 17 of 226).

10. PWGSC, GIR, Exhibit 16 (Exhibit PR-2017-063-12, Vol. 1A at 192 and 195 of 226).

11. Attachments to the Complaint (Exhibit PR-2017-063-01A, Vol. 1 at 57 of 145).

12. PWGSC, GIR at paras. 33-34 (Exhibit PR-2017-063-12, Vol. 1A at 18 of 226).

13. Exhibit PR-2017-063-01, Vol. 1 at 5 of 22.

PROCEEDINGS OF THE COMPLAINT

16. On March 16, 2018, RAA/ACT filed the present complaint with the Tribunal.
17. On March 22, 2018, the Tribunal informed the parties that the complaint had been accepted for inquiry because 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*.
18. On April 24, 2018, PWGSC filed its Government Institution Report (GIR) with the Tribunal in accordance with section 103 of the *Rules*.¹⁴
19. On May 4, 2018, RAA/ACT filed its comments on the GIR.
20. Given that the information on the record was sufficient to determine the merits of the complaint, the Tribunal decided that an oral hearing was not necessary and ruled on the complaint based on the written record.

ANALYSIS

21. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.
22. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, is the *Canadian Free Trade Agreement*.¹⁵
23. The *CFTA* requires that a procuring entity provide potential suppliers with all information necessary to permit them to prepare and submit responsive bids, including the criteria which will be used for evaluating and awarding the contract.¹⁶ It must also treat all bids under procedures that guarantee the fairness and impartiality of the procurement process.¹⁷

14. Although the GIR was originally due April 17, 2018, the Tribunal granted a request by PWGSC for an extension of time to file the GIR to April 24, 2018.

15. *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*]. Note that, although the solicitation only referred to the application of the *CFTA*, the Tribunal considered the possibility that the *North American Free Trade Agreement (NAFTA)* and other trade agreements could also be applicable to the procurement given that the solicitation is for a requirement to provide Advanced Composite Repair training courses for practising military Aircraft Structures technicians. However, as it is clear that the *CFTA* applies, and as the relevant obligations under that agreement are essentially the same as those under *NAFTA* and the other trade agreements, the Tribunal will focus its analysis on the *CFTA* provisions.

16. Article 509(7) of the *CFTA* provides as follows: “A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Tender documentation shall include all pertinent details concerning: (a) the evaluation criteria that will be used in the evaluation of tenders, including the methods of weighting and evaluation, unless price is the sole criterion”

17. Article 515(1) of the *CFTA*.

24. The *CFTA* further requires that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and require that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.¹⁸

25. The RFP provided that bids would be assessed in accordance with technical and financial criteria and called for the award of the contract to the compliant bid with the lowest price.¹⁹ The mandatory technical criteria were set out in Appendix 1 to Annex A, which specified that “[f]ailure to meet any of the mandatory requirements . . . will result in [the bidder’s] proposal being determined non-responsive and it will be given no further consideration.”²⁰

26. As mentioned above, the original complaint challenged PWGSC’s determination that RAA/ACT’s proposal did not comply with mandatory technical criteria M2 to M5 of the RFP. It is a well-established principle that the onus is on bidders to ensure they have met all mandatory criteria of a solicitation in order for their proposal to be deemed compliant.²¹ Following its review of the GIR, RAA/ACT accepted the comprehensive explanation provided by PWGSC for its determination of non-compliance with regard to each of the criteria in question, with the exception of M2.²² It submitted that the only aspect of the solicitation it still disagreed with was the inclusion of criterion M2 b) in the RFP, arguing that it provided an unfair advantage to the successful bidder, ENA, on the basis that it was a government-funded community college.

27. In light of the foregoing, the Tribunal considers that RAA/ACT has effectively withdrawn its allegations regarding the evaluation of its bid and PWGSC’s determination that it did not meet mandatory technical criteria M2 to M5. The Tribunal will, therefore, limit its analysis to the remaining allegations regarding criterion M2 b) and ENA’s status as a government-funded community college, as well as the timeliness of the debriefing.

The Alleged Unfairness of Mandatory Technical Criterion M2 b)

28. Mandatory technical criterion M2 (“Compliance with Certification requirements”) provides as follows:

- a) The Bidder must be a Transport Canada Approved Training Organization for Aerospace training. The Bidder must submit their TC approval certificate(s) with accreditation to prove compliance; and
- b) *Applicable provincial registration as a professional vocational institution or equivalent.*

[Emphasis added]

18. Article 515(4) of the *CFTA* provides as follows: “To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation.” Article 515(5) provides as follows: “[T]he procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted: (a) the most advantageous tender; or (b) if price is the sole criterion, the lowest price.”

19. RFP, Mandatory Technical Criteria, subsection 4.1.1.1, and Basis of Selection – Mandatory Technical Criteria, subsection 4.2 (Exhibit PR-2017-063-12, Vol. 1A at 49 of 226).

20. RFP, Appendix 1 to Annex A (Exhibit PR-2017-063-12, Vol. 1A at 65 of 226).

21. *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at para. 28; *Valcom Consulting Group Inc. v. Department of Public Works and Government Services* (9 July 2014), PR-2013-044 (CITT) at para. 42;

22. RAA/ACT, Comments on the GIR (Exhibit PR-2017-063-14, Vol. 1B at 1).

29. RAA/ACT argued that criterion M2 b) should not have been included in the RFP “as it automatically eliminates private industry non-government funded institutions who provide training services that do not require registration by provincial guidelines, but offer the exact services being requested in the bid solicitation” from consideration in the procurement.²³ In particular, RAA/ACT was of the view that provincial registration as a vocational institution or equivalent created “an impossible double standard of compliance” where “[p]rovincial vocational training programs do not apply to the ‘technology courses’ requested in the RFP and provincial vocational training programs do not apply to DND military training courses.”²⁴

30. The Tribunal finds that to the extent RAA/ACT disagreed with the inclusion of mandatory technical criterion M2 b) in the RFP, it should have made its objection to PWGSC or filed a complaint with the Tribunal when it first became aware of this particular issue (i.e. before its proposal was submitted), as opposed to waiting until after the contract was awarded to another bidder.

31. Subsections 6(1) and (2) of the *Regulations* provide 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.

32. The provisions of subsections 6(1) and (2) of the *Regulations* are clear that 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.²⁵

33. The Tribunal has often stated that bidders bear the onus to “keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.”²⁶ It is thus up to the bidder to make sure to consider any issues in a solicitation and to file any complaint in a timely manner.

34. The Tribunal considers that RAA/ACT reasonably should have known of this ground of complaint when it obtained a copy of the RFP, which was issued on September 12, 2017, or, at the latest, prior to submitting its bid on September 26, 2017. Accordingly, the deadline for RAA/ACT to make an objection to PWGSC or to file a complaint with the Tribunal would have been, at the very latest, October 10, 2017 (which is 10 working days from September 26, 2017).

23. RAA/ACT, Comments to the GIR (Exhibit PR-2017-063-14, Vol. 1B at 1).

24. Attachments to the Complaint (Exhibit PR-2017-063-01A, Vol. 1 at 63 of 145).

25. *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at paras. 20-22.

26. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII), at para. 20.

35. In light of the above, the Tribunal concludes that RAA/ACT's allegation challenging the inclusion of criterion M2 b) in the RFP was filed beyond the deadline set out in the *Regulations* and, therefore, cannot be further considered by the Tribunal.

The Alleged Bias in Favour of the Successful Bidder

36. With respect to the allegation that the award of contract was biased in favour of ENA, RAA/ACT submitted that ENA's status as a government-funded community college gave its bid an unfair advantage in relation to mandatory technical criterion M2 b) and its ability to submit a lower bid price. In particular, RAA/ACT's objection email to PWGSC, dated March 3, 2018, stated: "As the successful bidder is a government sponsored, government funded post-secondary Quebec Career College, I question how any private sector company can fairly bid against a government entity, asking for proposals to financially compete against the very institutes that the government financially supports and controls."²⁷

37. In addition, RAA/ACT claimed that the selection of ENA's bid for contract award may have been tied to its financial performance, raising a question of the possible application of undisclosed evaluation criteria, i.e. giving a preference to community colleges facing financial difficulties. In this respect, RAA/ACT alleged that the contracting authority made a statement during the March 7, 2018, phone call to the effect that "Community Colleges were often awarded training contracts if the college was not performing financially well enough".²⁸

38. The Tribunal has long held that a ground of complaint must have some evidentiary basis to suggest that there is a breach to a relevant trade agreement.²⁹ Having reviewed a copy of the evaluators' notes for ENA's proposal,³⁰ the Tribunal finds no indication that the evaluators were biased or applied undisclosed criteria in the evaluation of ENA's bid. The evidence shows that the bids of both RAA/ACT and ENA were subject to the same evaluation procedures and criteria. Other than the above comment allegedly made by the contracting authority, there is no factual evidence of bias towards ENA's bid on the basis of its status as a government-funded community college, or otherwise. With respect to that alleged comment, the Tribunal finds that allegation, on its own, to be an insufficient basis to establish that the evaluation of ENA's bid was biased.³¹

The Debriefing Provided by PWGSC

39. RAA/ACT submitted that, despite its repeated requests for a debriefing throughout January and February 2018, it only received a debriefing document from PWGSC on March 2, 2018, after RAA/ACT had contacted the Procurement Ombudsman. In addition, RAA/ACT alleged that the debriefing document did not contain any explanation for the determination that RAA/ACT's bid was non-compliant with the technical mandatory criteria identified therein.

27. Attachments to the Complaint (Exhibit PR-2017-063-01A, Vol. 1, at 57 of 145).

28. RAA/ACT, Procurement Complaint Form (Exhibit PR-2017-063-01, Vol. 1 at s. 4. F.)

29. *Tyr Tactical Canada, ULC* (May 16, 2016), PR-2016-006 (CITT) at para. 26.

30. PWGSC, GIR, Confidential Exhibit 10 (Exhibit PR-2017-063-12A, Vol. 2).

31. Moreover, to the extent that RAA/ACT had concerns with regard to the procurement being open to the participation of government-funded community colleges, then, similar to the Tribunal's finding above, it should have raised those concerns earlier in the procurement process (i.e. prior to bid closing). Yet, RAA/ACT did not question this until its objection to PWGSC of March 3, 2018, as quoted above, by which point it was time-barred by section 6 of the *Regulations*.

40. Although RAA/ACT had to wait until March 7, 2018, to receive a further debriefing (by telephone) on the procurement from PWGSC, it nonetheless received a debriefing, and the Tribunal is satisfied that PWGSC fulfilled its duty under the applicable terms of the RFP and the *CFTA* in this regard.³²

41. The Tribunal notes, however, that the scope of the complaint could have potentially been narrowed significantly had PWGSC been more forthcoming in its debriefing with RAA/ACT as to the reasons its bid was determined to be non-compliant with the mandatory technical criteria of the RFP. In the absence of a detailed explanation for its non-compliance, RAA/ACT sought recourse before the Tribunal. However, once it received the GIR, RAA/ACT was ultimately satisfied with the detailed explanations provided by PWGSC for the non-compliance of its bid and only pursued its complaint regarding the remaining grounds addressed above.

Conclusion of the Complaint Analysis

42. For the reasons provided above, the Tribunal finds that the complaint is not valid.

COSTS

43. PWGSC requested its costs in responding to the complaint.

44. Although the above-mentioned deficiencies in the debriefing provided by PWGSC to RAA/ACT did not amount to a breach of the *CFTA*, the Tribunal is of the view that had PWGSC offered a timely debriefing with a more detailed explanation for RAA/ACT's non-compliance, it would have simplified the scope of the original complaint. In particular, it is unlikely that RAA/ACT would have filed its complaint with respect to the grounds that were withdrawn after it received a more detailed explanation in the GIR.

45. As such, the Tribunal's preliminary indication is that each party should bear its own costs and, therefore, no costs will be awarded in this matter.

DETERMINATION OF THE TRIBUNAL

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

47. The Tribunal determines, as a preliminary indication, that it will not award costs in this matter. If PWGSC disagrees with the preliminary indication regarding costs, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Tribunal reserves jurisdiction to establish the final amount of the cost award, if any.

Serge Fréchette
Serge Fréchette
Presiding Member

32. Pursuant to Article 516 of the *CFTA*, "a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the procuring entity did not select its tender." Section 1.3 of the RFP stated that, upon request by a bidder, the contracting authority was required to provide a debriefing "in writing, by telephone or in person".