

Ottawa, Thursday, July 20, 2000

File No.: PR-2000-004

IN THE MATTER OF a complaint filed by Kildonan Associates Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination:	July 20, 2000
Tribunal Member:	Zdenek Kvarda
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Philippe Cellard
Complainant:	Kildonan Associates Inc.
Government Institution:	Department of National Defence

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STATEMENT OF REASONS

On April 25, 2000, Kildonan Associates Inc. (Kildonan) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No.: DND 99/0630) by the Department of National Defence (DND) for the provision of resources for the management and administration of the Canadian Peacekeeping Service Medal (CPSM) Project. The requirement is for an initial four-year period plus one additional option year.

Kildonan alleged that, when DND evaluated and scored its proposal, and then judged it to be non-compliant, it did not follow the procedures detailed in the Request for Proposal (RFP). Specifically, Kildonan alleged that its proposal was declared non-compliant on the basis of a criterion (lack of demonstrated commitment or evidence of contractual obligation of the “as required” personnel) not set out in the RFP. As well, Kildonan alleged that DND used, in the evaluation of its proposal, an approach contrary to that described in the RFP.

Kildonan requested, as a remedy, that its proposal be judged compliant and evaluated against other compliant proposals, utilizing the original score that it earned. In the alternative, Kildonan requested to be compensated for the 20-percent management and administrative fees that it would have earned had it been awarded the contract.

On May 3, 2000, the Tribunal informed the parties that the complaint had been accepted for inquiry 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. On May 26, 2000, DND filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On June 9, 2000, Kildonan filed comments on the GIR with the Tribunal. On June 19, 2000, the Tribunal sought additional information from DND on the bid evaluation process in this instance. On June 22, 2000, DND sent the requested additional information to the Tribunal. On June 30, 2000, Kildonan filed comments on DND’s additional information filed with the Tribunal.

1. R.S.C. 1985, c. 47 (4th Supp.) [hereinafter CITT Act].
2. S.O.R./93-602 [hereinafter Regulations].
3. S.O.R./91-499.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

On January 7, 2000, a Notice of Proposed Procurement and an RFP for the subject solicitation were posted on Canada's Electronic Tendering Service (MERX). The RFP reads, in part:

12. DND has a requirement for a project team consisting of one Project Office Manager/Senior Team leader and three Team leaders (*on a full time basis*) who will be responsible for. . .
13. Up to six additional "administrative support" resources will be required to provide assistance to the team leaders on an as required basis.
20. Bidders are encouraged to supply as much information as necessary to demonstrate clearly that the mandatory requirements are met and to ensure evaluated criteria can be properly assessed.
21. The bidder must have the capability and experience to provide administrative support resources on an as required basis within 5 days of notification.
22. The bidder must be capable of proposing the project team leaders (four candidates) whom meet or exceed the following mandatory qualifications . . .
 - ♦ hold or be eligible for a valid "Enhanced Reliability Security Clearance" (issued by the Industrial Securities Division of Publi[c] Works Government Services Canada): Note "eligibility" must be demonstrated through the submission of copies of the submission and/or response to/from ISD PWGSC)
23. The bidder must be capable of proposing at least (minimum) 6 and no more than 10 (maximum) "as required" "administrative support" candidates whom meet or exceed the following mandatory qualifications: . . .
 - ♦ hold or be able to obtain a valid "Enhanced Reliability Security Clearance".
24. Proposals that meet the mandatory qualification will be further evaluated. A point score will be awarded for the rated requirements based on how well the bidder demonstrates that the respective requirements have been met.

Eleven proposals were received by DND by bid closing on February 24, 2000, including one from Kildonan. The contracting officer provided the technical portion of all proposals to the CPSM project director⁴ for evaluation against the mandatory and rated requirements set out in the RFP. The CPSM project director who had prepared the "bid evaluation form" (i.e. the evaluation grid) acted as secretary to the technical evaluation team (evaluation team), which also consisted of two⁵ DND staff members. On March 3, 2000, the CPSM project director, in accordance with DND practice, forwarded the results of the bid evaluation (and the completed "bid evaluation forms") to the contracting officer with an E-mail message. The E-mail, in part, reads: "The evaluators found that nine firms [including Kildonan] were compliant and two were not fully compliant. All bids were scored. Capt. [a DND staff member on the evaluation team] will provide you written comments on Monday since he has some important observations." The contracting officer, on reviewing the results of the evaluation, noted that the mandatory requirements pursuant to paragraphs 21, 22 and 23 of the RFP had not been included on the evaluation grid nor had they been assessed during the technical evaluation. As a result, the contracting officer requested that the evaluation grid be modified to include the three missing mandatory requirements and that all the

4. A consultant or contractor with Kildonan.

5. One of the DND staff members was replaced for part of the process.

remaining proposals be re-evaluated according to the revised evaluation grid. On March 20, 2000, the results of the new evaluation conducted by one of the two DND staff members mentioned above, with the assistance of the CPSM project director, were submitted to the contracting officer. The results, in part, revealed that the proposal submitted by Kildonan did not clearly demonstrate that all the RFP mandatory requirements had been met.

On March 24, 2000, DND informed Kildonan, in writing, of its intent to award the contract to Excel Human Resources, the winning bidder. The letter, in part, reads:

I regret to inform you that your proposal was judged as non-compliant, as it did not clearly demonstrate that the following mandatory qualification had been met.

Paragraph 21. The bidder must have the capability and experience to provide administrative support resources on an as required [basis] within 5 days of notification.

On March 29, 2000, Kildonan objected, in writing, to DND's decision. In its letter, Kildonan submitted that the fact that it identified, in its proposal, the maximum of ten (10) support personnel by name, with accompanying resumes, in itself demonstrated that these individuals were committed to working on the CPSM project for Kildonan.

To determine whether there was merit to Kildonan's assertion, the contracting officer conducted, on April 4 or 5, 2000, another review of Kildonan's proposal against the mandatory qualifications in the RFP. According to the GIR, this review revealed that, although Kildonan did identify 10 support staff in its proposal, of the 10 resumes provided, only 3 clearly demonstrated that all of the mandatory criteria of paragraph 23 of the RFP had been met. This review also revealed that Kildonan's proposal did not clearly demonstrate that the mandatory requirement of paragraph 22 of the RFP, i.e. that all team leaders hold or be eligible for a valid "Enhanced Reliability Security Clearance," had been met. Kildonan failed to demonstrate this requirement in its proposal for one of the four team leaders that it proposed.

On April 10, 2000, DND responded to Kildonan's letter, stressing that its proposal did not contain a clear capability and compliance statement nor had it demonstrated commitment or evidence of contractual obligation of the "as required" personnel.

POSITION OF PARTIES

DND's Position

DND submitted that, in accordance with paragraph 24 of the RFP, because Kildonan failed to clearly demonstrate in its proposal that it met the mandatory qualifications set out in the RFP, its proposal could not be further evaluated nor given further consideration.

DND argued that the evaluation procedures set out in the RFP were followed and that Kildonan's proposal was not scored against the rated criteria once it was judged not responsive to certain mandatory requirements. DND submitted that to judge Kildonan's proposal compliant would be contrary to the RFP and the provisions of Article 10.8.6⁶ of the Treasury Board of Canada Contracting Policy.

6. Article 10.8.6 reads, in part: "Acceptance of bids. . . a valid bid is a priced offer submitted in response to a solicitation from a contracting authority that meets all of the requirements stipulated. . . A bid or proposal is invalid (on non-responsive) if it does not meet all the mandatory requirements."

DND submitted that Kildonan's proposal could only be judged to be responsive on the basis of a partial list of the mandatory criteria set out in the RFP. To accept such a situation, DND submitted, would effectively reduce or change the mandatory requirements after the bid closing date and time. This would be unfair to the other bidders as well as to the potential suppliers who chose not to submit a bid because they knew that they did not meet all the mandatory requirements stipulated in the RFP.

Kildonan's Position

Kildonan submitted that all DND personnel involved in the evaluation of proposals were aware that the CPSM project director was on contract with Kildonan when the bid evaluation form was designed, reviewed and implemented. Kildonan further submitted that the DND contracting officer had the opportunity to review the proposed bid evaluation form and correct any errors or omissions felt necessary prior to the evaluation process. In fact, Kildonan asserted that the contracting officer had approved the bid evaluation form as satisfactory for the purpose.

Kildonan also submitted that the contracting officer knew Kildonan's score and relative standing when she requested an adjustment to the bid evaluation form and a re-evaluation of all the proposals. Furthermore, Kildonan submitted that the findings of the review conducted after March 29, 2000, cannot be considered germane to this inquiry as they are the result of a review aimed specifically at one bid, which was conducted after the fact and, arguably, by a non-independent reviewer.

Kildonan added that DND is attempting to impute its evaluation procedural errors to the fact that the CPSM project director was on contract with Kildonan. However, Kildonan submitted, the fact remains that DND was ultimately responsible for the evaluation of the proposals and that, contrary to the procedures detailed in the RFP, although Kildonan's proposal allegedly failed to meet a mandatory requirement, DND evaluated and scored its proposal.

With respect to the reason invoked by DND to declare its proposal non-compliant, Kildonan submitted that the letter of reference from a Canadian Forces' Logistics Branch advisor, dated February 15, 2000,⁷ submitted in its proposal demonstrates its capability and experience in providing quality personnel on short notice.

In its comments of June 30, 2000, Kildonan submitted that re-evaluating proposals after they have been scored and ranked could be viewed as a method of eliminating proposals that are overly expensive (not in line with budget) or as a method of selecting the preferred firm.

VALIDITY OF THE COMPLAINT

Tribunal's Decision

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, 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. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was

7. Complaint, Tab 3.

conducted in accordance with the *Agreement on Internal Trade*⁸ and the *North American Free Trade Agreement*.⁹

Article 1015(4)(a) of NAFTA provides that “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 have been submitted by a supplier that complies with the conditions for participation.” Article 506(6) of the AIT, in part, 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.”

The Tribunal must decide, in this instance, whether DND evaluated Kildonan’s proposal in accordance with the methodology set out in the RFP and according to the mandatory criteria set out therein. In the Tribunal’s opinion, paragraph 21 of the RFP clearly required that bidders have the capability and experience to provide administrative support resources on an as required basis within five days of notification. Paragraph 20 of the RFP encouraged bidders to supply as much information as possible to demonstrate clearly that the mandatory requirements were met. In addition, paragraph 24 of the RFP indicated that the proposals meeting the mandatory qualifications would be further evaluated and the rated requirements scored.

The Tribunal is satisfied that, in evaluating Kildonan’s proposal, DND properly applied the evaluation methodology set out in the RFP and correctly assessed Kildonan’s proposal relative to the mandatory requirement described in paragraph 21 of the RFP.

After a careful and detailed examination of the complete procurement process, the Tribunal finds that, due to an error by DND in developing the evaluation grid for this solicitation, three mandatory requirements, including the one described in paragraph 21 of the RFP, were left out from the grid. As a result, when the first evaluation was conducted by the evaluation team, these mandatory factors were not assessed for any of the proposals submitted, and 9 of the 11 proposals submitted were determined to be compliant (including Kildonan’s) and were scored. Soon after this first evaluation, the contracting officer discovered that three mandatory requirements of the RFP (mandatory criteria in paragraphs 21, 22 and 23) had not been assessed due to a deficiency in the evaluation grid. The evaluation grid was, therefore, revised to include all the mandatory requirements set out in the RFP. A second evaluation of all proposals found compliant during the first evaluation was then conducted. In the Tribunal’s opinion, DND acted diligently to correct its administrative error when it was found and it acted in good faith and fairly towards all potential suppliers throughout the evaluation process. As a result, the Tribunal finds that DND did not act contrary to NAFTA and the AIT when it re-evaluated Kildonan’s proposal. The Tribunal also notes that Kildonan was not prejudiced by DND’s administrative error.

It is on the occasion of the second evaluation that DND determined that Kildonan’s proposal failed to meet the requirement described in paragraph 21 of the RFP. In this respect, the Tribunal finds that, although DND applied this requirement strictly, it acted reasonably in the matter, in accordance with the terms of the provision. Indeed, there was no clear mention in Kildonan’s proposal, nor in the letter of reference from DND’s Logistics Branch advisor included in the proposal, that Kildonan had the capability and experience to provide administrative support resources on an as required basis within five days of notification. The letter of reference simply stated that Kildonan was able to provide competent, qualified personnel on short notice. It was reasonable for DND to conclude that Kildonan had not demonstrated its capability and experience in providing “administrative support resources” on an as required basis, within

8. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].

9. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

five days of notification. The Tribunal will not substitute its judgement for that of the evaluation team. The Tribunal finds that DND did not act contrary to NAFTA and the AIT when it found Kildonan's proposal non-responsive to the mandatory criteria in paragraph 21 of the RFP nor when it declared the proposal non-compliant.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the provisions of NAFTA and the AIT and that, therefore, the complaint is not valid.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member