



Ottawa, Wednesday, June 5, 2002

File No. PR-2001-056

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

AND FURTHER TO 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the designated contract be terminated and awarded to ACMG Management Inc., on the condition that it meet all the mandatory requirements of the Request for Proposal under the Request For Supply Arrangement, Solicitation No. E60BQ-000SAD/A, Requisition No. W8485-1-UUFC 23, Task No. 1-UUFC 23. In the event that ACMG Management Inc. does not meet the mandatory requirements, the Canadian International Trade Tribunal recommends, as an alternate remedy, that a new solicitation for the designated contract be issued.

Pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards ACMG Management Inc. its reasonable costs incurred in preparing a response to this solicitation and in proceeding with this complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: June 5, 2002

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Michèle Hurteau

Complainant: ACMG Mangagement Inc.

Counsel for the Complainant: Geoffrey C. Kubrick
Yasir A. Naqvi

Intervener: Fleetway Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Christianne M. Laizner
Susan D. Clarke



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STATEMENT OF REASONS

On January 21, 2002, ACMG Management Inc. (ACMG) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. E60BQ-000SAD/A) by the Department of Public Works and Government Services (PWGSC) of the services of a senior life cycle technologist (SLCT) in support of the Aviation Life Support Equipment (ALSE) Project of the Department of National Defence (DND).

ACMG alleged that, contrary to Article 1015(4)(d) of the *North American Free Trade Agreement*² and Article 506(6) of the *Agreement on Internal Trade*,³ the candidate proposed for the position of SLCT by Fleetway Inc. (Fleetway), to which the contract was awarded, did not meet the mandatory requirements stated in the Request for Proposal (RFP) and the Request For Supply Arrangement (RFSA). It further alleged that DND and PWGSC failed to properly apply the evaluation criteria and essential requirements for the SLCT outlined in the RFP and the RFSA and improperly awarded the contract to a non-compliant bidder.

ACMG requested, as a remedy, that the contract be terminated and awarded to it as the only technically compliant bidder or, in the alternative, that a contract be awarded on a sole source basis to it to provide similar services under the same terms and conditions. If the Tribunal is unable to award the remedies sought, then ACMG requested that it be awarded \$50,000 in compensation for the loss of profit over the initial contract period of two years. It also requested that the Tribunal award it the costs that it incurred in preparing a response to the RFP and in proceeding with its complaint.

On January 25, 2002, 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*.⁴ On February 5, 2002, the Tribunal granted intervener status to Fleetway. On February 26, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian*

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
 4. S.O.R./93-602 [hereinafter Regulations].

*International Trade Tribunal Rules.*⁵ On March 20, 2002, ACMG and Fleetway filed their comments on the GIR with the Tribunal. Additional submissions were filed by Fleetway on March 25, 2002, and by PWGSC on March 28, 2002. On April 26, 2002, the Tribunal ruled that it would accept PWGSC's submissions and certain arguments that had been raised in Fleetway's submission of March 25, 2002. ACMG submitted a response on May 2, 2002.

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 September 13, 2001, PWGSC received a requisition⁶ from DND for the procurement of the services of an SLCT (SLCT #1) and the option to acquire the services of an additional SLCT (SLCT #2) in support of the ALSE Project. On October 25, 2001, an RFP, Solicitation No. E60BQ-000SAD/A,⁷ was issued to 32 firms that qualified under the RFSA⁸ to bid for the provision of services. This RFP was scheduled to close on November 19, 2001.

Annex B to the RFP⁹ contains the following stipulations that are relevant to this case:

2.0 METHOD OF EVALUATION.

2.1 The technical proposal will be evaluated in two (2) parts, as follows:

- a. Mandatory Requirements for Supply Arrangement as per para 5.1 of this annex; and
- b. Additional Mandatory Requirements for ALSE Project as per para 5.2 of this annex.

5.1 Mandatory Requirements for Supply Arrangement.

The bidder's proposal shall include a completed Curriculum Vitae (preferably following the format set out in Appendix 1 to Annex "E" of the RFSA) for all proposed personnel. Proposals not meeting the mandatory RFSA requirements will be considered technically NON-COMPLIANT and will be given no further consideration. The Curriculum Vitae shall fully demonstrate that the proposed personnel meet or exceed the RFSA mandatory requirements for;

The Senior Life Cycle Technologist category as outlined in art 8.2B of the Annex B of the RFSA.

5.2 ALSE Project Mandatory Requirements for the Senior Life Cycle Technologist:

The proposed SLCT # 1 & # 2 shall meet or exceed the following mandatory requirements:

- a. Each SLCT shall possess a minimum of thirty six (36) months of demonstrated DND project management experience in the last seventy-two (72) months. This experience shall have included the preparation and co-ordination of each of the following:
 - Project Charts;
 - Statements of work;
 - Project schedules;
 - Agenda and minutes of meetings.

5. S.O.R./91-499.

6. GIR, Exhibit 2.

7. GIR, Exhibit 3.

8. PWGSC published the RFSA on Canada's Electronic Tendering Service (MERX) on August 1, 2000.

9. GIR, Exhibit 4.

- b. Each SLCT shall possess a minimum of six (6) months of demonstrated experience in the last thirty (36) six months in using Material Acquisition desktop and Defence Management System procedures having conducted on a regular basis internet/intranet searches on material acquisition and project management issues;
- c. The SLCT # 1 shall possess training and/or demonstrated work experience that allow him to work efficiently on the QSS – Doors Version 5.1 Software. If the SLCT # 1 does not possess this training and/or demonstrated work experience, the bidder shall include the certification ‘DOORS 5.1 (para F of section 14 (Mandatory certifications)’ of the RFP for task 1-UUFC 23) in its proposal.
- d. Each SLCT shall possess a minimum of six months of demonstrated direct experience in the management and/or co-ordination of project(s) for the transfer to industry of each of the following:
 - LCMM^[10] responsibilities.
 - PMS^[11] responsibilities.
 - TIES^[12] responsibilities.

Actual experience providing LCMM, PMS and TIES services will not be considered as acceptable experience under this criteria.

Overall demonstrated experience for this criteria can be obtained through more than one project.

6.0 SELECTION OF WINNING PROPOSAL

6.3 The winning proposal will be the lowest priced technically and financially compliant proposal.

Article 8.2B of Annex B to the RFSA¹³ contains the following mandatory requirements for the SLCT occupational category in respect of proposed candidates who are Canadian Forces trained personnel:

8.2 OCCUPATIONAL CATEGORIES

B. SENIOR LIFE CYCLE TECHNOLOGIST

(1) Civilian Trained Personnel

graduation from a three (3) year technologist diploma program offered by a recognized technical institute; - or - eligibility for registration as a technologist by a recognized provincial licensing body;

-AND-

five (5) years of practical hands-on experience in a maintenance management related activity;

Canadian Forces Trained Personnel

qualified to the QL7 trade level (or pre-1987 equivalent) in a related technical field;

- (2) knowledge of evaluation, preparation and implementation of technical documentation;
- (3) knowledge of the preparation and distribution of Integrated Logistics Support (ILS) documentation;
- (4) knowledge of any DND environment Engineering and Maintenance Management System; and

10. Life cycle materiel manager.

11. Program management support.

12. Technical investigative engineering studies.

13. GIR, Exhibit 1.

- (5) knowledge of maintenance system interfaces with the Canadian Forces Supply System (CFSS) and a DND financial/managerial accounting system.

In response to the RFP, proposals were received by the bid closing date from ACMG and Fleetway. On November 21, 2001, copies of the bidders' technical proposals were forwarded to DND for evaluation. On December 6, 2001, DND advised PWGSC that both bidders were evaluated as technically compliant. PWGSC also determined that the bidders' financial proposals complied with the requirements of the RFP. On December 11, 2001, it awarded Contract Serial No. W8485-1-UU25/14-BQ with an estimated value of \$167,776, GST included, to Fleetway, the bidder with the lowest-priced compliant bid. That same day, PWGSC advised ACMG of the results.

On December 19, 2001, ACMG filed an objection with PWGSC, which stated that Fleetway's proposed candidate for the SLCT #1 position did not meet all the mandatory requirements set out in the RFP. ACMG's objection was based upon information, including a résumé, that it had obtained from the same candidate in connection with an unrelated RFP for another SLCT position. On December 21, 2001, PWGSC forwarded a copy of the objection to DND for review and comment. On the same day, it also requested information from Fleetway that would enable it to verify the evaluation. On December 27, 2001, DND confirmed to PWGSC its original technical evaluation results, as well as provided suggestions regarding information to substantiate the qualifications required by the RFP.

After receiving Fleetway's response and reviewing it with DND, PWGSC issued a letter to ACMG, dated January 9, 2002, confirming the results of the original technical evaluation and denying ACMG's objection. In the debriefing held on January 17, 2002, at ACMG's request,¹⁴ PWGSC confirmed to ACMG that the résumé provided with Fleetway's proposal was not the same as the one upon which ACMG had relied in support of its objection. It also confirmed that it could not respond directly to some of ACMG's requests for information because to do so would violate a bidder's third party rights under the *Access to Information Act*¹⁵ and that, in accordance with its administrative procedure, access to such information would have to be pursued through a formal request in accordance with the *Access to Information Act*.

On January 25, 2002, the Tribunal advised PWGSC that it had accepted a complaint from ACMG for inquiry.

POSITION OF PARTIES

ACMG's Position

ACMG submitted that Fleetway's candidate for the SLCT position did not meet the criteria outlined in the RFP and the RFSA. It indicated that it knew the qualifications of Fleetway's candidate because it had reviewed his résumé and interviewed him in connection with another RFP for an SLCT position. It submitted that the technical background and work experience of Fleetway's candidate show that he is not qualified to be an SLCT, in that he was not qualified to the QL7 trade level; that he did not meet the SLCT requirements of the RFSA; that he did not possess a minimum of three years of DND project management experience; that he did not possess the six months of demonstrated experience in using the Material Acquisition Desktop and Defence Management System; and that he did not have direct experience in the management and/or co-ordination of projects for the transfer to industry of each of the LCMM, PMS and TIES responsibilities.

14. Complaint, tab 6.

15. R.S.C. 1985, c. A-1.

With respect to the QL7 qualification, ACMG submitted that Fleetway's candidate must produce an appropriate authority document to attest to his QL7 qualification to meet the requirement of paragraph 3(vi) of Annex E to the RFSA. It indicated that the candidate had no such signed document. ACMG also submitted that the résumé of Fleetway's candidate does not clearly demonstrate his stated qualification or experience with respect to the mandatory requirements of article 8.2B of Annex B to the RFSA and, therefore, does not meet those requirements. According to ACMG, Fleetway's candidate does not possess the knowledge in these areas to the level consistent with that of an SLCT. His work experience in the last 10 years has been in the area of publications, except for one year where he was a junior LCMM holding the rank of Warrant Officer.

With respect to the requirement for DND project management experience in the last six years, ACMG argued that Fleetway's candidate clearly did not meet this requirement, as an LCMM holding the rank of sergeant was not involved in any project management. The candidate was not working with DND when the Material Acquisition Desktop was introduced on DND's Intranet. Finally, ACMG argued that the résumé of Fleetway's candidate indicates that he was never involved with DND projects that deal with the transfer to industry of LCMM services or contract management services. It concluded by stating that its candidates meet all the mandatory qualifications and provided a summary of these.

In its reply submissions on the GIR, ACMG stated that Fleetway's proposal is not technically compliant and that PWGSC's submissions and the evaluation by DND are merely based on the résumé summary presented by Fleetway as part of its proposal. ACMG submitted that DND relied on Fleetway's characterization of its candidate's experience without any verification of his credentials. Furthermore, it submitted that there is no independent evidentiary proof that Fleetway's candidate meets all the mandatory requirements outlined in the RFSA and the RFP.

ACMG submitted that the RFP clearly states that the winning bid must meet all the mandatory requirements and must be technically compliant, even if it is the lowest priced. According to ACMG, a proposal that is the lowest priced but does not comply with all the mandatory requirements should not be awarded the contract.

ACMG submitted that, with respect to PWGSC's assertion that the complaint is based on an incomplete résumé of Fleetway's candidate, a comparison of the résumé and the résumé summary filed by Fleetway shows no difference in the substantive qualifications and positions held by that candidate.

ACMG also submitted that DND and PWGSC did not undertake any verification of the proposals in accordance with the mandatory requirements of both the RFSA and the RFP. Furthermore, ACMG stated that there is no evidence that Fleetway submitted copies of the required diplomas and/or certificates attesting to its candidate's qualifications, such as the QL7 trade level certification. It submitted that it complied fully with this requirement and submitted all the relevant diplomas and certificates with its proposal, including a signed document attesting that its candidates were qualified to the QL7 trade level. Accordingly, ACMG submitted that DND evaluators did the evaluation without any assessment and verification of the qualifications of Fleetway's candidate and that he is not qualified to the QL7 trade level.

Moreover, ACMG submitted that PWGSC has incorrectly characterized Canadian Forces Administrative Order (CFAO) 49-4, entitled "Career Policy Non-commissioned Members Regular Force".¹⁶ It pointed out that CFAO 49-4 does not state that three years' seniority in the rank of Warrant Officer qualifies for the QL7 trade level. Furthermore, ACMG submitted that Annex A to CFAO 49-4 states

16. GIR, Exhibit 15.

that the prerequisites for promotion to the rank of Master Warrant Officer are three years' seniority in the rank of Warrant Officer and qualification as a QL7. It stated that the QL7 trade level is not based on seniority, but is given after the successful completion of a prescribed course or examination. ACMG submitted that, in the absence of the rank of Master Warrant Officer, Fleetway must produce the commanding officer's (CO) certification (CF 743) to attest to its candidate's experience as QL7 certified in order to be technically compliant with the RFP. It further submitted that, at best, the candidate is qualified for the position of junior life cycle technician (JLCT), assuming that he possesses the level of knowledge required for a JLCT, as stated in the RFSA, which requires a QL6 trade level. ACMG argued that, if a QL6 trade level could have qualified for an SLCT position, there would have been no need to make a distinction between the requirements for JLCT (QL6) and SLCT (QL7). It further submitted that, since 1987, there have been no means of achieving qualification "equivalent" to the QL7 trade level. Furthermore, ACMG submitted that a candidate must possess a QL7 trade level certification (signed and attested by the Canadian Forces) in order to meet the mandatory requirements of the RFSA.

Regarding the criteria outlined in paragraphs (2) to (5) of article 8.2B of Annex B to the RFSA, ACMG argued that they can only be fulfilled by a candidate with a QL7 trade level. The criteria are used to evaluate the candidate's level of technical and managerial knowledge for the SLCT position and that it is reasonable to expect that the level of knowledge expected and required to fill the position of SLCT would be greater than that required for a JLCT. In ACMG's submission, these tasks can only be accomplished by a Master Warrant Officer or Warrant Officer qualified to QL7 at the level of senior LCMM. In its view, anything less constitutes the experience of a JLCT.

In response to the submissions of Fleetway and PWGSC of March 25 and 28, 2002, respectively, ACMG stated that three years' seniority as a Warrant Officer does not qualify Canadian Forces personnel to the QL7 trade level. Neither the RFSA nor the RFP "allow" experience as a Warrant Officer as sufficient to meet the mandatory QL7 technical requirement. Annex A to CFAO 49-4 simply states that a member of the Canadian Forces needs three years' seniority and QL7 qualification to be promoted from Warrant Officer to Master Warrant Officer. ACMG pointed out that the QL7 trade level and rank are two distinct qualifications; as such, a Warrant Officer can be at a QL7 trade level and not be promoted to the rank of Master Warrant Officer. Therefore, it submitted that, if DND evaluated Fleetway's candidate as qualified to the QL7 trade level simply on the basis of his seniority, then DND was in error.

DND has clearly prescribed the only methods by which QL trade levels can be achieved. ACMG submitted that Annex D of CFAO 49-4 states that QL is achieved on the date on which the member of the Canadian Forces successfully completes a prescribed course or examination, or when he or she obtains a CO's certification. There is no prescribed QL7 trade course or examination for avionics systems technicians. As such, a Canadian Forces' Air Force technician can only be qualified as a QL7 if he or she obtained a CO's certification. Fleetway's candidate has not been granted such a certification and, therefore, is not qualified to the QL7 trade level. Fleetway's candidate only possesses a QL6B trade level, which, at best, qualifies him for the position of JLCT.

ACMG submitted that PWGSC and Fleetway's assertion that the RFSA requires something less than a QL7 certification by using the words "qualified to the QL7 trade level" is unsupported and without foundation. The term "QL7 trade level" is a technical term used by DND. ACMG submitted that QL7 is an abbreviation for "Qualified QL7" and that the RFSA refers to the QL7 trade level in its full and proper title, as outlined in CFAO 49-4. Furthermore, it submitted that the RFSA does not state "eligible to the QL7 trade level", as suggested by PWGSC and Fleetway, but that the RFSA requires actual qualification to the QL7 trade level. As such, ACMG stated that Fleetway's candidate must possess a CF 743 A (Unit Employment

Records qualification record sheet), certifying his qualification to the QL7 trade level, in order to satisfy the requirements of the RFSa. Finally, it asserted that, in fact, the service record of Fleetway's candidate would seem to indicate that he did not attain the QL7 trade level qualification.

PWGSC's Position

PWGSC submitted that Fleetway's proposed candidate for the position of SLCT was properly evaluated as qualified to the QL7 trade level. It referred to Annex B to the RFSa, which states that the mandatory requirement for the SLCT is that he or she be qualified to the QL7 trade level or (pre-1987 equivalent) in a related technical field.

Furthermore, PWGSC submitted that the résumé reviewed by ACMG did not specifically address the requirements of the RFP at issue and that ACMG did not have as complete information with respect to the proposed candidate's qualifications and experience acquired during his military career as would be available to DND. It also submitted that the résumé summary submitted with Fleetway's proposal clearly indicated that the individual had achieved the QL7 level (or pre-1987 equivalent) in a related technical field. According to PWGSC, three years' seniority as a Warrant Officer is the prerequisite to qualify for the Master Warrant Officer rank and for qualification to the QL7 trade level. Consequently, PWGSC concluded that the proposed candidate was properly evaluated as qualified to the QL7 trade level. Moreover, the "Occupational Specification for the Avionic Systems Technician Occupation" was replaced with other specifications¹⁷ that make it clear that, in addition to the senior leadership course and qualification to the QL6B level, no additional training and no specialty courses are required for promotion to the Master Warrant Officer rank in this occupation.

Regarding ACMG's suggestion that the proposed candidate provide a record sheet to attest to his QL7 qualification, PWGSC submitted that this is based on the assumption that such a form is generated for all Canadian Forces members upon their accumulation of years of seniority, experience and training, which comprise the requirements to qualify to certain QL levels. According to PWGSC, such a form is not always generated at the time at which a member qualifies to a certain level. PWGSC argued that ACMG is incorrect in saying that the proposed candidate must produce a record sheet to attest to his QL7 qualification, as there is no such requirement contained in the solicitation documents.

PWGSC submitted that there is no requirement in paragraphs (2) to (5) of article 8.2B of Annex B to the RFSa that limits the SLCT position to Canadian Forces personnel holding the rank of Master Warrant Officer or having attained the qualifications of a senior LCMM. Rather, the requirement is "knowledge of evaluation, preparation and implementation of technical documentation". PWGSC submitted that the résumé summary specifically stated that Fleetway's candidate had gained extensive knowledge in this area. According to PWGSC, Fleetway's technical proposal included a résumé summary for the proposed candidate, which the evaluators determined was relevant to this requirement, and demonstrated that the proposed candidate had the requisite knowledge of evaluation, preparation and implementation of technical documentation.¹⁸

17. GIR, Exhibit 18.

18. GIR, Exhibit 16 (protected).

PWGSC also submitted that the information provided in the résumé summary was relevant to the requirement of the RFSA that related to knowledge of the preparation and distribution of ILS documentation.¹⁹

Regarding the requirement of paragraph (4) of article 8.2B of Annex B to the RFSA that the successful candidate have knowledge of “any DND environment Engineering and Maintenance Management System”, PWGSC pointed to the fact that the candidate had the required experience, as shown in his résumé summary.²⁰

Regarding the requirement of paragraph (5) of article 8.2B of Annex B to the RFSA that the successful candidate have “knowledge of maintenance system interfaces with the Canadian Forces Supply System (CFSS) and a DND financial/managerial accounting system”, PWGSC submitted that the evaluators determined that the information provided in the résumé summary demonstrated that the proposed candidate had the requisite knowledge of maintenance system interfaces with the CFSS and a DND financial/managerial accounting system. Furthermore, while ACMG contended that the proposed candidate’s résumé must indicate where, when (month and year) and how (through what activities/responsibilities) his stated qualification/experience were acquired, PWGSC submitted that the evaluators determined that these particulars were present based upon the entire résumé summary.²¹

With respect to ACMG’s argument that, despite occupying the position of LCMM, the proposed candidate did not carry out all the tasks of an LCMM and that the time period during which he was an LCMM did not afford him the proper experience to qualify for an SLCT, PWGSC submitted that this is based upon a résumé that was not submitted as part of Fleetway’s proposal and that did not specifically address the requirements of the RFP at issue. In addition, it stated that the evaluators evaluated the qualifications and experience of Fleetway’s proposed candidate cited in the résumé summary having regard to the Statement of Work (SOW) of the RFP and determined that the proposed candidate’s experience was directly relevant to the type of tasks to be conducted under the scope of work set out at article 2 of the SOW.²²

With respect to ACMG’s allegation that Fleetway’s candidate failed to meet the mandatory requirement at paragraph (a) of article 5.2 of Annex B to the RFP with respect to a minimum experience of three years of DND project management experience, PWGSC submitted that ACMG’s allegation may be founded on an incorrect interpretation of this requirement. It also stated that this experience must be determined in the proper context of the SOW, which does not contemplate “project management” in the sense of senior management or supervisory responsibility involving accountability for subordinate personnel, but rather the type of project management experience required is specifically for “Project Management Tasks” for purposes of “project management support services” and “life cycle management support services” in the sense of a co-ordination, assisting and research function.²³ Accordingly, PWGSC submitted that the “project management experience” of Fleetway’s proposed candidate is consistent with the DND project management experience contemplated by paragraph (a) of article 5.2 of Annex B to the RFP in the context of the relevant SOW in Annex A to the RFP. As a result, PWGSC submitted that Fleetway’s proposed candidate was properly evaluated as meeting the mandatory requirement of paragraph (a) of article 5.2 of Annex B to the RFP with respect to “DND project management experience”.

19. GIR, Exhibit 16 (protected).

20. *Ibid.*

21. *Ibid.*

22. GIR, Exhibit 19, articles 2.2 and 2.4.

23. *Ibid.*, articles 2.1 and 2.3, in particular, article 2.2.

ACMG contended that Fleetway's proposed candidate did not meet the requirement set out in paragraph (b) of article 5.2 of Annex B to the RFP concerning demonstrated experience in conducting Internet/Intranet searches on material acquisition and project management issues. PWGSC submitted that the basis for this contention is that the requisite experience could only have been obtained by an individual working with DND at a time subsequent to August 1999. It stated that this contention is without merit and that ACMG's interpretation of the requirement is incorrect. While ACMG submitted that it is only the most recent DND Material Acquisition Desktop and Defence Management System in place subsequent to August 1999 that should be the basis of such demonstrated experience, PWGSC stated that this position is not supported by the wording of the RFP, which states that the DND material acquisition desktop and defence management procedures must be demonstrated by "having conducted on a regular basis internet/intranet searches on material acquisition and project management issues". It pointed out that the evaluators determined that the information provided in the résumé summary was relevant to the above-noted requirement and demonstrated that the proposed candidate had the requisite six months of demonstrated experience in the last 36 months. PWGSC submitted that, if ACMG's interpretation is accepted, it would be impossible for any candidate to meet the requirement during the 36-month period specified, since the demonstrated experience would have to have taken place in the last 24 months, a period during which ACMG was the incumbent contractor.

ACMG contended that Fleetway's proposed candidate does not have the depth of experience of its proposed candidates with respect to the requirement of demonstrated experience in the management and/or co-ordination of projects for the transfer to industry of LCMM, PMS and TIES responsibilities. In this regard, PWGSC pointed out that the evaluation criteria did not award point ratings with respect to the depth of experience of proposed candidates and that any such comparison, as suggested by ACMG, is not the basis upon which the evaluation of proposals was to be conducted pursuant to the provisions of the RFP and is, therefore, irrelevant.

PWGSC concluded by stating that the complaint is based on information contained in a résumé that is incomplete, that it does not specifically address the requirements of the RFP at issue and that was not submitted with Fleetway's proposal. Furthermore, it submitted that the complaint is based on an incorrect interpretation of certain mandatory requirements of the tender documents. PWGSC contended that both it and DND acted in good faith and correctly evaluated Fleetway's proposal in a manner entirely consistent with the specific mandatory requirements of the solicitation documents. Accordingly, it requested that the complaint be dismissed and that it be awarded costs.

In a supplementary submission, PWGSC stated that there is no merit to the allegation raised by ACMG that only its candidates met the requirements of paragraph (c) of article 5.2 of Annex B to the RFP. It argued that Fleetway's proposal was correctly evaluated as fully compliant with those requirements because the required certification was included in the proposal. PWGSC further stated that the requirement that a proposed candidate be "qualified to the QL7 trade level" is not a requirement that relates to the proposed candidate's education, nor is the requirement for QL7 trade level certification, but rather a requirement that relates to skill and military occupation experience. PWGSC also submitted that the Canadian Forces "Occupational Specification for the Avionic Systems Technician Occupation" makes it clear that no additional training or specialty courses are required to qualify for the Master Warrant Officer rank and to qualify to the QL7 trade level, once a candidate has successfully completed QL6B training and the senior leadership course. According to PWGSC, three years' seniority in the rank of Warrant Officer is what is required for qualification to the QL7 trade level, and Fleetway's proposed candidate had completed both QL6B training and the senior leadership course and had in excess of three years' seniority in the rank

of Warrant Officer. Consequently, PWGSC stated that the proposed candidate was correctly evaluated as qualified to the QL7 trade level.

In response to ACMG's submission that, in the absence of a prescribed course or examination, there is a requirement for a CO's certification, PWGSC submitted that there is no requirement in the tender documents that the proposed candidate must produce a CO's certification or a record sheet and that the requirement specifically does not state "QL7 trade level certification", but rather qualification to the QL7 trade level. Consequently, it submitted that ACMG's argument that a prescribed course or a CO's certification is required is without merit and unsupported by the wording of the tender documents.

Finally, PWGSC addressed the issue of e-mail correspondence between the Technical Authority and the Contracting Authority where the Technical Authority provided a summary of his understanding of the grounds of ACMG's objections to Fleetway's bid and included ACMG's suggestions for additional information required from Fleetway. In that context, the evaluator indicated the information that ACMG suggested should be elicited from Fleetway.

Fleetway's Position

Fleetway supported PWGSC's position that the complaint is based on information contained in a résumé that is generic and did not contain the detailed information necessary for the RFP to which Fleetway responded. Fleetway submitted that it is obvious that ACMG has drawn conclusions based on incomplete information gathered from another, irrelevant, process with respect to a different RFP.

Fleetway submitted that, in accordance with the process for the supply arrangement contracts governing this procurement, it is normal and expected that the contractors responding to the RFP submit a résumé for each proposed candidate that is specific to the mandatory requirements of a given supply arrangement task. It further submitted that a generic résumé does not typically provide the details needed to demonstrate that the proposed candidate meets the specific requirements of the supply arrangement task. According to Fleetway, it followed this normal and expected practice to demonstrate that its proposed candidates met the requirements of the RFP.

Fleetway further submitted that ACMG's reliance on verbal discussions with the candidate in question and on a résumé that had not been prepared specifically for this supply arrangement is plainly wrong. It argued that ACMG obviously relied on incomplete information and on information gathered for a different RFP.

Fleetway stated that the Technical Authority designated in the statement of work for supply arrangement tasks rules on the technical compliance of proposed personnel and conducts an evaluation of proposals for supply arrangement tasks. According to Fleetway, the use of the words "rules" and "evaluated" establish that the Technical Authority has the mandate to interpret and to exercise reasonable judgement when declaring the submitted proposals compliant. Fleetway submitted that the GIR confirms that this normal and regular practice was followed in this instance.

Fleetway requested that it be reimbursed for costs incurred in responding to PWGSC and to the complaint, as well as for the costs associated with the standby time of its candidate. Finally, Fleetway submitted that the Tribunal, in determining the validity of the complaint, must not assume the role of the Technical Authority and apply its own judgement where that is more appropriately exercised by the Technical Authority. It also submitted that there has not been any procedural error and that the prescribed procedures and other requirements in respect of the designated contract have been observed.

In its supplementary submission of March 25, 2002, Fleetway submitted that the mandatory requirement in question for Canadian Forces trained personnel to be classified as SLCTs is, in fact, stated to be “qualified to the QL7 trade level (or pre-1987 equivalent)”. According to Fleetway, ACMG repeatedly misstated this requirement through the use of phrases such as “achieving qualification” or “QL7 certified” to misconstrue it to be something different from what it actually is. Fleetway stated that the true meaning of “qualified to” has to be interpreted and understood in the context of the complex DND rank, promotion and trade qualification system, as was done and explained in the GIR. Fleetway submitted that it is only the contract authorities and DND subject matter experts who are truly in a position to rule on compliance, as they are contractually designated to do and as they have done more than once in this instance.

Fleetway also stated that ACMG makes new unfounded allegations about its candidate based on a generic résumé. It submitted that the résumé filed with the complaint confirms that its candidate held senior LCMM positions at National Defence Headquarters from 1988 to 1992 and again from 1998 to 1999 and operated as a senior documentation support officer with project management responsibilities at National Defence Headquarters from 1992 to 1998. Contrary to ACMG’s allegations, the foregoing is clearly senior level experience directly pertaining to the mandatory requirements for an SLCT under the RFSA and the supply arrangement task in question. According to Fleetway, ACMG simply did not have first-hand knowledge of the candidate’s career details to support its allegations. Fleetway maintains that, to the contrary, it had, in good faith, verified and provided, with its proposal, the mandatory certification regarding its candidate’s education, training, work experience and history, as they pertained to the supply arrangement task in question.

According to Fleetway, ACMG mistakenly assumed that there is no dispute about its proposal being technically compliant. Fleetway submitted that this was not the case and pointed out that it was asked by the Tribunal to focus on the compliance of its own candidate. It stated that it proceeded, as per the Tribunal’s direction, but it noted that this does not mean that there is no dispute about the compliance of ACMG’s proposal.

TRIBUNAL’S DECISION

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. 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 that the Tribunal is required to determine whether the procurement was conducted in accordance with the trade agreements. The procurement in this case is covered by the AIT.²⁴

Article 506(6) of the AIT stipulates, in part, that 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.

ACMG alleged that the contract for an SLCT was wrongfully awarded to Fleetway, as its bid did not fully comply with the technical requirements stated in the RFP and the RFSA. Specifically, it alleged that Fleetway’s candidate for SLCT did not meet the mandatory requirements set out in the RFP and the RFSA, since he was not qualified to the QL7 trade level, as is required by these documents.

24. See AIT, article 502(1)(b) and Annex 502.1B.

After reviewing the evidence in this case, the Tribunal is not convinced that Fleetway's candidate was qualified to the QL7 trade level. In all other respects, however, the Tribunal is satisfied that the evaluation was carried out according to the requirements of the RFP and the AIT.

PWGSC submitted that Fleetway's proposed candidate was evaluated as qualified to the QL7 trade level based on the fact that he had in excess of three years' seniority as a Warrant Officer. It further submitted that no additional training or specialty courses were necessary to qualify to the QL7 trade level and that the mandatory requirement of the RFSA for the QL7 trade level does not require that a certificate or record sheet be submitted with the proposal. In this regard, PWGSC argued that the requirement specifically does not state "QL7 trade level certification", but rather qualification to the QL7 trade level.

In the Tribunal's opinion, PWGSC's submission implies that the proposed candidate need only be eligible for a trade level without having received or been granted the actual qualification. However, in the Tribunal's view, to interpret the phrase "qualified to the QL7 trade level" in this manner is clearly wrong.

Referring to Exhibits 15 and 18 of the GIR, PWGSC submitted that three years' seniority as a Warrant Officer is the prerequisite to qualify for the Master Warrant Officer rank and to qualify to the QL7 trade level. Based on the evidence before it, the Tribunal does not agree with this conclusion. CFAO 49-4 clearly indicates that the QL7 trade level qualification may be a prerequisite for promotion to the Master Warrant Officer rank, but nowhere does it state that three years' seniority in the rank of Warrant Officer qualifies an individual to the QL7 trade level. Table 4 of Exhibit 18 does not list the QL7 trade level qualification as a prerequisite for the avionics systems technician occupation and is, in this regard, consistent with Note 4 of Annex A to CFAO 49-4.²⁵

The Tribunal also notes that PWGSC requested, in an e-mail to Fleetway,²⁶ supporting evidence that its candidate was "QL7 qualified". In the Tribunal's view, the phrase "QL7 qualified" is an indication that the requirement was for a candidate who had attained that level rather than a candidate eligible for qualification to that level. The Tribunal further notes that ACMG's proposed candidate submitted a Unit Employment Records qualification record sheet that certifies that he was granted qualification to the TQ²⁷ 8 level. This same candidate's résumé also indicates that the TQ8 qualification was granted. This, in the Tribunal's view, supports ACMG's position that the phrase "qualified to the QL7 trade level" means that a person was actually granted a QL7 qualification.

The Tribunal also takes note of the following criteria in Annex D of CFAO 49-4 filed with ACMG's reply submission to the GIR:²⁸

5.c. . . . Where no further QL training is required, a member, on promotion to substantive rank, is qualified to the next QL effective the date of promotion.

. . . .

9. The date of achieving a QL is the date on which the member successfully completes a prescribed course or examination, or obtains the CO's certification, whichever is required for final qualification for the appropriate level in the MOC [military occupation].

25. GIR, Exhibit 15.

26. Complaint, tab 10.

27. The TQ designation was replaced by the QL designation in 1991. See GIR, Exhibit 15.

28. ACMG's reply submission, Tab 1.

The Tribunal has no evidence before it that the proposed candidate was promoted to a substantive rank or obtained a CO's certification. Furthermore, unlike ACMG's proposed candidate, the Tribunal has no tangible evidence that Fleetway's proposed candidate is qualified to the QL7 trade level. Thus, it is not convinced that Fleetway's candidate is qualified to the QL7 trade level, as is required by the RFSA.

PWGSC submitted that there is no requirement in the tender documents that a CO's certification or a record sheet be provided. Fleetway submitted that it acted in good faith, in that it verified and provided mandatory certification regarding the education, training, work experience and history of its candidates, as they pertained to the supply arrangement task in question. However, the Tribunal is of the view that the primary issue here is not one of verification or certification, but rather one of the interpretation of the phrase "qualified to the QL7 trade level". As it stated earlier, the Tribunal is of the opinion that "qualified to the QL7 trade level" does not mean that a candidate is eligible to that trade level, but rather that the candidate has been granted that qualification. One way of demonstrating that qualification to the QL7 trade level has been granted is a CO's certification. In this case, there is no indication, in the résumé of Fleetway's candidate, that he is qualified to the QL7 trade level. Moreover, in the Tribunal's view, the QL6B qualification does not satisfy the requirement set out in the solicitation documents.

Other than the interpretation of the QL7 trade level requirement, the Tribunal is satisfied that the evaluators properly applied the criteria and methodology of the solicitation documents in this matter. It is of the view that, unless the evaluators have not applied themselves in evaluating a bidder's response or have completely ignored information provided in a bid, the Tribunal will not substitute its judgement for that of the evaluators.

That having been said, the Tribunal wishes to address ACMG's submissions regarding the requirements set out in paragraphs (a) and (b) of article 5.2 of Annex B to the RFP.

With respect to paragraph (a), ACMG argued that PWGSC has taken a limited view of the scope of work specified in article 2 of Annex A to the RFP. It submitted that the scope of work specifically calls for the "overall management of the ALSE project", which project is extremely difficult and complex. The Tribunal is of the view that the evaluators' interpretation of the requirement of paragraph (a) is consistent with the terms of the RFP. The Tribunal is not convinced that the phrase "assist with the overall management of the ALSE project" requires the SLCT candidate to manage the ALSE Project. Rather, the phrase is consistent with providing a series of discrete tasks as enumerated in article 2 of Annex A.

With respect to paragraph (b), ACMG argued that Fleetway's proposed candidate was not working with DND when the Material Acquisition Desktop was introduced on DND's Intranet in the summer of 1999. In reply, PWGSC submitted that ACMG's position is that only the most recent DND Material Acquisition Desktop and Defence Management System in place subsequent to August 1999 should be the basis of such demonstrated experience. The Tribunal does not accept ACMG's interpretation of the requirement. In the Tribunal's view, the interpretation provided by PWGSC gives the requirement a broader application in time, which is consistent with the underlying objective of the clause, and thus gives it its most reasonable construction.

As for ACMG's submission on the written comments by DND²⁹ with regard to what would be required following the objection made by ACMG, the Tribunal is of the view that the further

29. GIR, Exhibit 11 (protected).

correspondence³⁰ between the Contracting Authority and Fleetway satisfied the overall substance of these recommendations. Thus, the Tribunal need not address these comments any further.

The Tribunal must now address the issue of relief in this matter. ACMG has requested that either the contract awarded to Fleetway be terminated and awarded to ACMG or, in the alternative, a contract to provide the same services under the same terms and conditions be awarded to ACMG on a sole source basis. In the further alternative, it requested that the Tribunal award it a lump sum of \$50,000 in compensation for loss of profit over the initial contract period. ACMG also requested its costs incurred in preparing a response to the RFP and in proceeding with the complaint.

The Tribunal will, first, address the alternative request by ACMG that it be awarded a contract for similar services on a sole source basis. The Tribunal will not grant this request. The purpose of the procurement provisions of the AIT is to reduce and eliminate, to the extent possible, barriers to the free movement of goods and services within Canada by ensuring equal access to all Canadian suppliers in a non-discriminatory, transparent and efficient manner. Sole sourcing is an exception to that general purpose and contemplated under the trade agreement. However, in light of article 506(12) of the AIT, the Tribunal is of the view that the circumstances in this case do not justify granting a request to award a contract on a sole source basis. Second, the Tribunal will also not grant the request for a lump sum payment for loss of profit, as this would place the Tribunal in the untenable position of indirectly sanctioning the award of a contract that was inconsistent with the AIT.

After having considered all the evidence, the Tribunal is of the view that the contract should be terminated and awarded to ACMG, on the condition that it meet all the mandatory requirements of the RFP and the RFSA. In the event that ACMG does not meet the mandatory requirements, the Tribunal recommends, as an alternate remedy, that a new solicitation for the designated contract be issued

Finally, the Tribunal awards ACMG its reasonable costs incurred in preparing a response to this solicitation and in proceeding with this complaint.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the designated contract be terminated and awarded to ACMG, on the condition that it meet all the mandatory requirements of the RFP under the RFSA, Solicitation No. E60BQ-000SAD/A, Requisition No. W8485-1-UUFC 23, Task No. 1-UUFC 23. In the event that ACMG does not meet the mandatory requirements, the Tribunal recommends, as an alternate remedy, that a new solicitation for the designated contract be issued.

Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awards ACMG its reasonable costs incurred in preparing a response to this solicitation and in proceeding with this complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member

30. GIR, Exhibits 10 and 12.