



Ottawa, Tuesday, September 3, 2002

File No. PR-2002-012

IN THE MATTER OF a complaint filed by K-W Leather Products Ltd. 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.

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 Department of Public Works and Government Services set up an evaluation team comprised of new evaluators to conduct a re-evaluation. The proposals to be re-evaluated are those submitted by the four potential suppliers that were eligible for the evaluation process for the rated requirements in this solicitation. This re-evaluation is to be done for paragraph 2.4.e of Annex C to the Bid Evaluation Plan only, in accordance with the requirements set out in the Request for Proposal.

For purposes of further clarity, the evaluators conducting the re-evaluation are not to consider administrative functions (e.g. invoicing) as part of the production processes listed in paragraph 2.4.e of Annex C to the Bid Evaluation Plan. With respect to paragraphs 2.5.h, 2.5.i, 2.5.j, 2.5.l, 2.5.m and 2.5.n, the Canadian International Trade Tribunal recommends that the evaluators give the maximum scores to all proposals for these paragraphs, as these requirements were not specifically listed in paragraph 78.4 of the Request for Proposal. The Canadian International Trade Tribunal recommends this latter approach in order to maintain the total scoring scheme as is and to avoid the redistribution of the relative points to other paragraphs.

Following the re-evaluation, if K-W Leather Products Ltd.'s proposal is determined to have the highest value/performance score according to the methodology set out in paragraph 82 of the Request for Proposal, the Canadian International Trade Tribunal recommends that the contract awarded to FELLFAB Limited be terminated and that it be awarded to K-W Leather Products Ltd. As an alternative to terminating the contract awarded to FELLFAB Limited, should K-W Leather Products Ltd. be determined to have the highest value/performance score, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services compensate K-W Leather Products Ltd. for the profit that it lost in being deprived of the contract. The basis for calculating the lost profit will be the price submitted by K-W Leather Products Ltd. in its proposal in response to Solicitation No. W8476-019901/A.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards K-W Leather Products Ltd. its reasonable costs incurred in relation to preparing and proceeding with this complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: September 3, 2002
Date of Reasons: September 10, 2002

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Cathy Turner

Counsel for the Tribunal: Clarissa Lewis

Complainant: K-W Leather Products Ltd.

Intervener: FELLFAB Limited

Government Institution: Department of Public Works and Government Services

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



Ottawa, Tuesday, September 10, 2002

File No. PR-2002-012

IN THE MATTER OF a complaint filed by K-W Leather Products Ltd. 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*.

STATEMENT OF REASONS

COMPLAINT

On June 4, 2002, K-W Leather Products Ltd. (K-W) 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. W8476-019901/A) by the Department of Public Works and Government Services (PWGSC) of tactical vests for the Department of National Defence (DND).

K-W alleged that, contrary to Article 506(6) of the *Agreement on Internal Trade*,² PWGSC improperly evaluated its proposal by using evaluation criteria that were not clear or not stated at all in the solicitation document. In particular, K-W alleged that the rated scores for its proposal (technical capability, managerial capability and quality assurance) were unfair.

K-W requested, as a remedy, that its bid be re-evaluated. If the Tribunal is unable to recommend the remedy sought, then K-W requested that it be awarded compensation for the profit that it lost in being deprived of the contract.

On June 13, 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*.³ On June 26, 2002, the Tribunal granted intervener status to FELLFAB Limited (FELLFAB). On July 9, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On July 22 and 23, 2002, respectively, FELLFAB and K-W filed their comments on the GIR with the Tribunal.

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.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
 3. S.O.R./93-602 [hereinafter Regulations].
 4. S.O.R./91-499.

PROCUREMENT PROCESS

On December 27, 2001, PWGSC published a Notice of Proposed Procurement (NPP) on MERX, Canada's Electronic Tendering Service, for tactical vests for DND. The bid closing date was February 19, 2002. It was subsequently extended to March 5, 2002, by amendment No. 003 to the RFP, issued on February 8, 2002. The bid closing date was further extended to March 8, 2002, by amendment No. 007 to the RFP issued on March 4, 2002.

Bids were to be submitted in two volumes: volume I containing the signed RFP and financial information; and volume II containing all submissions with respect to the mandatory and rated requirements. Volume II was at issue in this complaint.

Paragraph 13 of the RFP reads, in part, as follows:

2. A post contract award meeting may be convened within twenty (20) calendar days after award of contract to clarify contract related issues. . . . Other meetings may be convened as required.

Paragraph 14 of the RFP reads, in part, as follows:

1. The Contractor shall provide a progress report on the deliverables by the last working day of each month.

Paragraphs 78, 78.1, 78.2, 78.3 and 78.4 of the RFP read as follows:

78) VOLUME 2 – Part I of Bidder Response (Technical Capability, Managerial Capability & Quality Assurance)

Volume 2 contains both Mandatory and Rated Requirements, as detailed below. Mandatory Requirements will be assessed as “met” or “not met”.

Rated requirements will be assigned points based on the depth and quality of information received as well as the extent to which compliance with the requirement is demonstrated. A simple statement of compliance will be insufficient and a bid will be deemed to be non-responsive if supporting documentation is not submitted.

REFER TO PARA 81 for Weighting Scheme

78.1 Proven Manufacturing Experience (This is a RATED requirement):

The bidder is required to demonstrate that it has proven experience and competence in the manufacture of an item of this complexity. Information to be provided by the bidder to support its compliance with this requirement:

1. Submission of a *corporate profile* which includes:
 - (a) number of years in business;
 - (b) number of employees;
 - (c) annual sales volume/revenue;
 - (d) description of major product lines;
2. Submission of a complete *list of significant contracts* performed for related products during the past two years including:
 - (a) value of the contract;
 - (b) description of the items manufactured including the quantity produced and the end use;
 - (c) period of the contract;
 - (d) name and location of the customer; and
 - (e) pertinent details regarding the production facilities required to perform the contracts.

If the manufacturer has completed government or military contracts, these should be included, regardless of the value of the contract(s).

78.2 Proven Production Facility: (This is a RATED requirement).

The bidder is required to demonstrate that it has a proven production facility. Information to be provided by the bidder to support its compliance with this requirement:

1. Submission of a description of existing production facilities, equipment/tooling and locations. This should include,
 - (a) details of the manufacturing facility where the bidder intends to produce the items covered in this RFP;
 - (b) identification of the specific production processes that will be required under any resultant contract;
 - (c) identification of any equipment and tooling that will have to be acquired in order to complete any contract resulting from this RFP. Lead times on the acquisition of such items should be indicated; and
 - (d) identification of significant subcontractors and the specific work that they will perform.
 - (e) identification of Test Agency Support, including details of internal or test agency support that will be used for testing under any resultant contract.

78.3 Quality Assurance (QA) Plan (This is a RATED requirement)

Quality Assurance (QA) Plan: The **Bidder** is required to submit a QA plan in accordance with the requirements of ISO 10005 (Quality management – Guidelines for quality plans). The QA plan shall include the specific quality practices, resources and processes that will be employed in the performance of work under any resultant contract relating to:

- (a) management responsibilities
- (b) the relationship to the Quality system
- (c) contract review
- (d) the control of documents
- (e) the control of suppliers
- (f) the control of customer supplied product
- (g) the control of product identification and tractability
- (h) the control of manufacturing processes and workmanship standards
- (i) the control of inspection and test procedures
- (j) the control of inspection, measuring and test equipment
- (k) the control of nonconforming material
- (l) the control of storage, packaging and delivery
- (m) the control of quality records and audits
- (n) training of production personnel
- (o) the use of statistical techniques.

78.4 Delivery Plan and Schedule (This is a rated requirement)

Bidders are to provide a delivery plan and a schedule with their bid, based on delivery requirements as detailed below. The following information is required.

- (a) dates for ordering all materials
- (b) initial receipt dates for all materials
- (c) subsequent receipt dates for all materials
- (d) date of submission of pre-production samples (expressed in number of days after contract award date).
- (e) start date of production (expressed in number of days after pre-production sample approval)

- (f) planned weekly production rate (item 0001)
- (g) plant weekly production rate and percentage devoted to the proposed contract
- (h) first delivery date and quantity
- (i) ongoing delivery dates, and quantity
- (j) material requirements to meet each delivery phase

The delivery plan and schedule will be reviewed by the Administrative Authority and Contracting Authority and will form part of any resultant contract.

Paragraph 82 of the RFP, as amended by amendment No. 005, reads, in part, as follows:

82) Basis of Contractor Selection

The Best Value/Performance Determination will be determined using a weighted formula which includes the following factors:

<u>Aggregate Cost</u> - all items (firm & minimum optional quantities)	Relative Weighting of 35%
<u>Volume Two – Part I</u> <u>Technical & Managerial Capability & Quality Assurance</u>	Relative Weighting of 15%
<u>Volume Two – Part II</u> <u>Technical</u>	Relative Weighting of 50%
<u>Best Value/Performance Determination</u>	Aggregate cost (35%) + Volume two – Part 1 (15%) + volume 2 – Part II (50%)

**THE BIDDER WITH THE HIGHEST VALUE/PERFORMANCE SCORE AS DEFINED
HEREIN WILL BE RECOMMENDED FOR AWARD OF THE CONTRACT**

Seven proposals from five potential suppliers were received. Two potential suppliers, including K-W, submitted two proposals covering two different types of fabric. One of the potential suppliers was excluded for failing to respond to a mandatory requirement, leaving four potential suppliers for the evaluation process for the rated requirements.

PWGSC developed a Bid Evaluation Plan before the bid closing date to provide guidance in the evaluation of proposals. Paragraph 2.4 of Annex C to the Bid Evaluation Plan dealt with “Manufacturing Capability”, and the category was worth a total of 150 points. Relevant paragraphs of the Bid Evaluation Plan read, in part, as follows (the total points allocated for each criterion are also shown):

- 2.4.b** Does the proposal include a list of contracts for related products (if the manufacturer has completed government or military contracts these should be included regardless of value) in the previous three years? [25 points]
- 2.4.c** Does the submission on contracts list contain details on -Contract value . . . -Description of products . . . -Quantity delivered . . . -Period of the contract . . . -Name and location of customer . . . -Pertinent production record summaries of facilities, test data and records for these contracts, military contracts should be included regardless of their value. [35 points]
- 2.4.e** Does the proposal include the following elements: -Description of facilities used in garment similar in scope to the tactical vest manufacture? . . . -Description of production processes used in current production? . . . -Listing of the existing and planned production equipment and special production requirement? . . . Listing of pertinent sub-contractors for this requirement, if applicable? [40 points]

Paragraph 2.5 of Annex C to the Bid Evaluation Plan dealt with “Delivery Plan and Schedule”, and the category was worth a total of 150 points. Relevant paragraphs read, in part, as follows:

- 2.5.b Does the schedule include lead time and expected delivery times for each of the materials, fabrics and findings for initial production start and for subsequent orders? [10 points]
- 2.5.c Does the proposal identify the pre-production samples delivery dates expressed in days from contract award? [10 points]
- 2.5.f Does the proposal identify the percentage of personnel resource dedicated to the proposed contract? [10 points]
- 2.5.g Does the proposal include the first delivery date and quantity and the projected delivery dates and quantity thereafter? [10 points]
- 2.5.h Is there evidence that the bidder has identified critical paths/items? Project schedule identifying all critical milestones and critical path. [10 points]
- 2.5.i Does the proposal identify the manufacturing capabilities and resources needed to reach production requirement [10 points]
- 2.5.j Does the proposal identify the requirements for testing fabrics and findings at regular and scheduled interval? [10 points]
- 2.5.l Does the proposal identify scheduled progress meetings with the customer? [10 points]
- 2.5.m Does the proposal identify scheduled meetings and report submission? [10 points]
- 2.5.n Does the proposal contain the proposed organisation chart showing the company relationship between all those involved in the contract i.e. workers, supervisors, managers and directors? Clear line of communications must also be identified. [10 points]

According to PWGSC, on May 22, 2002, PWGSC advised FELLFAB that it had been awarded the contract in the amount of \$10,734,364.51. The notice of award was published on MERX the same day. On May 23, 2002, PWGSC sent K-W a facsimile confirming the result of the procurement process and provided its overall scores in the rated part of the evaluation. According to PWGSC, between May 22 and 28, 2002, K-W initiated a series of telephone conversations with it regarding the outcome of the procurement process. On May 28, 2002, at K-W's request, PWGSC sent K-W the evaluation scoring sheets for its proposal.

On May 31, 2002, K-W sent a letter to PWGSC raising a number of objections to the scores awarded to its proposal with respect to the technical capability, managerial capability and quality assurance portions of its proposal. The detailed objections that form the basis of K-W's complaint are as follows:

- 2.4.b K-W objected to the assessment of the complexity of its related products in the last two years. Further, K-W noted that there was a discrepancy between the RFP, where it requires a list of related products in the last two years, and in paragraph 2.4.b of Annex C to the Bid Evaluation Plan, where it indicates three years.
- 2.4.c K-W objected to the assessment of the complexity of its related products based on the period of past contracts.
- 2.4.e K-W objected to the assessment of its proposed description of the production process that will be required under any resultant contract and its choice not to engage subcontractors for this requirement.
- 2.5.b K-W objected to the assessment of its proposed delivery time for all materials.
- 2.5.c K-W objected to the assessment of the delivery dates for its pre-production samples.
- 2.5.f K-W objected to the assessment of its proposed percentage of personnel resources dedicated to the proposed contract.

- 2.5.g K-W objected to the assessment of its proposed first delivery date and quantities and their projected delivery dates and quantities thereafter.
- 2.5.h K-W objected that the RFP did not ask for the critical path to be provided as part of the proposal.
- 2.5.i K-W objected that the RFP did not ask for workforce task loading to be provided as part of the proposal.
- 2.5.j K-W objected that there was no mention of this requirement in the RFP under the delivery schedule.
- 2.5.l, 2.5.m and 2.5.n K-W objected that these paragraphs were not stated in the delivery schedule requirement in the RFP and that they should be taken out of the evaluation.

That same day, PWGSC received a letter from counsel for K-W, describing the evaluation process as “flawed and unfair” and asking that it be reviewed.

On June 3, 2002, PWGSC replied to K-W, indicating that a review of the evaluation process had been conducted in light of the comments submitted by K-W, but that the evaluators could see no reason to change the results of the evaluation. On June 4, 2002, K-W filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC’s Position

PWGSC submitted that the evaluation conducted by PWGSC and DND was conducted on a fair and reasonable basis and was consistent with the requirements of the solicitation. Accordingly, PWGSC submitted that K-W’s allegations are without merit and should be dismissed.

PWGSC further submitted that a number of general principles apply to issues raised in this complaint:

- (1) Fairness requires that proposals be evaluated only on the basis of the information included by bidders in their proposals. To do otherwise amounts to bid repair. Bidders cannot demand that the Crown seek out information not submitted by bidders by initiating further inquiries. Nor can the Crown take into account additional information subsequently offered by bidders.
- (2) All of the requirements at issue in this Complaint were rated, not mandatory, requirements. As such, responses to these requirements were to be evaluated qualitatively on their merits as effective responses to the challenges posed by the solicitation.
- (3) Paragraphs 78.1 and 78.2 of the RFP specifically stated that the burden was on the bidder to “demonstrate” that it had the requirements called for in the solicitation.
- (4) Paragraph 78 of the RFP explicitly stated that the rated requirements at issue would be “assigned points based on the depth and quality of the information received as well as the extent to which compliance with the requirement is demonstrated.”

With respect to the issue of “complexity” as it relates to paragraphs 2.4.b and 2.4.c of Annex C to the Bid Evaluation Plan, PWGSC submitted that the tactical vest was inherently more complicated than predecessor equipment and that, consequently, its production would also be inherently more demanding than that required for previous contracts. Given this reality, PWGSC stated that the RFP specifically drew the attention of potential suppliers to the challenge of “complexity” in the capability requirements set out in

paragraph 78.1 of the RFP. PWGSC submitted that the evaluators carefully examined the list of contracts submitted by K-W and determined that they did not demonstrate the required complexity and that the points awarded to K-W's proposal reflected that technical assessment.

Paragraph 2.4.c of Annex C to the Bid Evaluation Plan dealt with the length of the proposed contract. Given the fact that the contract for the production of the tactical vests was for several years, PWGSC stated that the Crown was prepared to award additional points to a potential supplier that could show experience in the management of such longer term contracts.

Since the requirement for demonstrating contract experience was not limited to DND contracts, PWGSC stated that a potential supplier was free to refer to any relevant non-DND contract or non-Crown contract. According to PWGSC, the evaluators judged that the short-term contracts listed by K-W merited only one out of four points in this regard.

With respect to the reference to "three years" in the text of paragraph 2.4.b of Annex C to the Bid Evaluation Plan, as opposed to "two years" in the RFP, PWGSC stated that this was an inadvertent typographical error. PWGSC submitted that the evaluators were aware of the error and conducted the evaluation in accordance with the requirements of the RFP, i.e. using the two-year time frame.

According to PWGSC, K-W only briefly dealt with specific production processes as they relate to paragraph 2.4.e of Annex C to the Bid Evaluation Plan, in response to paragraph 78.2(c) of the RFP. This portion consisted of only 15 pages, that is, pages 32 to 47 of volume 2 of K-W's proposal. The evaluators noted that the submitted material appeared to consist of a recitation of the comprehensive work instructions set out by the Crown in Appendix XI to Annex C, Tactical Vest Manufacturing Data. This was provided for the assistance of potential suppliers in the preparation of proposals. PWGSC further submitted that, in the circumstances, the evaluators determined that the depth and quality of such a response did not merit any points, since it added nothing to the knowledge of the Crown about K-W's capabilities.

PWGSC submitted that K-W appears to have misunderstood the evaluators' comments with respect to subcontractors (paragraph 2.4.e of Annex C to the Bid Evaluation Plan). PWGSC argued that, contrary to K-W's assertion, K-W was not penalized for not proposing a subcontractor. K-W was free to make a proposal that did not include a subcontractor. However, PWGSC submitted that, in the absence of a subcontractor, the evaluation of proposed production facilities would be dependent entirely on K-W's own facilities, which consisted, in part, of a leased facility. The evaluators held concerns about the leased facility's capacity and reliability, given the limited information provided.

With respect to the delivery schedule (paragraph 2.5.b of Annex C to the Bid Evaluation Plan), PWGSC submitted that the evaluators noted only a single lead time set out in the schedule, without further elaboration. PWGSC submitted that, in the evaluators' view, the differing lead times for each material should have been addressed, along with some indication of an assessment of the varying risks and planning measures to mitigate potential risks. PWGSC determined that any submitted schedule that failed to identify and address such a fundamental planning issue was lacking in depth and quality.

The next matter addressed by PWGSC was the delivery dates for pre-production samples as indicated in paragraph 2.5.c of Annex C to the Bid Evaluation Plan. The evaluators noted that the schedule seemed to suggest that pre-production samples would be ready before the materials were delivered. PWGSC argued that, as a matter of fairness to all suppliers, evaluators can only assess information included in the proposal itself.

With respect to production rates and workload allocation (paragraph 2.5.f of Annex C to the Bid Evaluation Plan), PWGSC stated that the evaluators were extremely concerned with K-W's statement, in its proposal, that it planned to devote 100 percent of the company's production capacity to produce the tactical vests. PWGSC submitted that this appeared to create a situation with little margin to deal with unexpected circumstances.

Further to paragraphs 2.5.g and 2.5.h of Annex C to the Bid Evaluation Plan, PWGSC submitted that the RFP stated that the delivery plan and schedule would be evaluated with respect to its depth and quality. PWGSC further submitted that this was a clear indication that the evaluation process would not be merely a confirmation that a series of enumerated minimum points of information had been submitted, yielding full points. PWGSC argued that an essential feature of any sophisticated plan of this nature is a critical path. PWGSC stated that this is particularly so where a business is engaged in current projects and has committed itself to devoting all the capacity of the business immediately to the new contract.

PWGSC further submitted that the delivery plan was evaluated for the extent to which it described how K-W proposed to deploy its individual staff, managers and equipment in order to meet production deadlines and requirements (workforce task loading, as it relates to paragraph 2.5.i of Annex C to the Bid Evaluation Plan). PWGSC submitted that this is a fundamental aspect of any business planning and, as such, was inherently a fundamental part of a delivery plan.

In response to K-W's allegation that testing requirements, as they relate to paragraph 2.5.j of Annex C to the Bid Evaluation Plan, were not referred to in the RFP, PWGSC submitted that amendment No. 006 to the RFP added Annex N, which set out detailed requirements for submission by the contractor of independent testing results. Therefore, PWGSC submitted that it was perfectly reasonable for the evaluators, with reference to the obligations under the RFP, to consider awarding additional points to delivery plans and schedules and to refrain from awarding such points where a submitted plan and schedule did not address this obligation.

In response to K-W's allegation that there was no reference to scheduled progress meetings in the RFP (paragraph 2.5.l of Annex C to the Bid Evaluation Plan), PWGSC submitted that one such meeting is potentially called for within 20 days of contract award. Such a meeting would be a critical milestone for the contractor. PWGSC submitted that it ought to have been included in a delivery plan and schedule. Further, PWGSC submitted that monthly progress reports, as they relate to paragraph 2.5.m of Annex C to the Bid Evaluation Plan, is an important requirement described in paragraph 14 of the RFP.

In response to K-W's allegation that there was no reference to an organizational chart in the RFP under the delivery schedule (paragraph 2.5.n of Annex C to the Bid Evaluation Plan), PWGSC submitted that it is a fundamental aspect of any good delivery plan that it clearly indicate who is responsible for what task and that it is equally important that a plan indicate the responsibilities and lines of communication for each of these individuals. In this regard, PWGSC referred to article 3.8 of ISO 10005.

PWGSC submitted that the terms of the RFP clearly placed the burden on potential suppliers to demonstrate, in their proposals, their capacity to meet the production challenges posed by the manufacture of the tactical vests. PWGSC submitted that the evaluators determined that, with respect to the elements at issue in this complaint, K-W had not met the burden set out in the RFP or that the material submitted was lacking in quality and depth, given the requirements of the RFP. Finally, PWGSC submitted that the evaluation of K-W's proposal, with regard to the rated requirements, was conducted fairly and in accordance with the requirements of the RFP.

FELLFAB's Position

FELLFAB submitted that it was in agreement with the information contained in the GIR and that it supported PWGSC's position.

K-W's Position

In its complaint, K-W detailed the areas of the evaluation that it alleged were conducted incorrectly or inappropriately. A summary of those elements was shown in reference to K-W's objections to PWGSC and will not be repeated here.

With respect to paragraphs 2.4.b and 2.4.c of Annex C to the Bid Evaluation Plan, K-W submitted that its products in the past years have been at least as difficult to produce as, and in some cases more difficult to produce than, the tactical vests.

K-W also questioned its rating for the requirement of a delivery schedule. K-W submitted that it is common, when planning production, to ascertain that materials can be ready by a certain start-up date and that it confirmed that the suppliers had given sufficiently reliable assurances that such a deadline would be met. For this reason, K-W submitted that a single start-up date was given.

Regarding delivery dates for the pre-production samples, K-W submitted that its proposal made an allowance for the acceptance of pre-production samples. K-W further submitted that acceptance or rejection can take no more than an hour, that fabrication takes a day and that the production time line makes allowances for this. K-W also submitted that the production process of pre-production samples is necessarily ahead of the normal run of production, hence the term "pre-production". In the case of an experimental cloth, K-W submitted that the timing shown for this process is more than warranted, it is essential.

With respect to progress meetings, K-W submitted in its comments on the GIR that there is nothing in paragraph 13 of the RFP that shows any requirement for progress meetings. K-W submitted that there is the suggestion that someone may call a meeting and that the contractor may even be invited to attend – at any rate, the contractor will be responsible for the minutes of the meeting, whether invited or not. K-W further submitted that being told that a meeting may happen is not the same as requiring that it be planned upon in the production schedule.

K-W submitted that the decision to use a critical path analysis is primarily taken in large complex projects. K-W did not consider this project to be in that category. K-W submitted that its decision to meet a milestone of producing 500 (or more) items a week, and the fact that the items were identical, used the same techniques and the same raw materials, meant that there was no need for a critical path analysis.

Finally, K-W submitted that depth and quality can also be demonstrated through being concise and that it illustrated that the project's realities were understood, accounted for and planned for. K-W further submitted that the evaluation, in showing that the RFP did not contain critical data required by the evaluators, was faulty. In addition, K-W submitted that it complied, to the letter, with what was required and should, therefore, be awarded full marks; not to have anticipated the requirements of the evaluation process cannot be construed, in any fair process, as having failed to completely address the requirements.

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 applicable trade agreements, which, in this instance, is the AIT.

Article 506(6) of the AIT provides, in part, 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.”

K-W alleges that some of the criteria that were used in the evaluation of bids were either not clearly stated or not stated at all in the RFP and that, therefore, its bid was unfairly evaluated.

The Tribunal carefully reviewed paragraphs 78, 78.1 (Proven Manufacturing Experience), 78.2 (Proven Production Facility), 78.3 (Quality Assurance Plan), 78.4 (Delivery Plan and Schedule) of the RFP and the Bid Evaluation Plan developed by PWGSC to assist the evaluators. The Tribunal is satisfied that, except for paragraphs 2.5.h, 2.5.i, 2.5.j, 2.5.l, 2.5.m and 2.5.n of Annex C to the Bid Evaluation Plan, the criteria at issue contained in the Bid Evaluation Plan match those of the foregoing paragraphs.⁵ The Tribunal will, in addition to paragraphs 2.4.e and 2.5.g of Annex C to the Bid Evaluation Plan, focus on these evaluation criteria, which are in respect of the quality assurance plan and the delivery plan and schedule under paragraphs 78.3 and 78.4, respectively, of the RFP.

The Tribunal is of the view that, unless the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement or have based their evaluation on undisclosed criteria, the Tribunal will not substitute its judgement for that of the evaluators.⁶

The Tribunal is, therefore, satisfied that the evaluators reasonably applied the criteria listed in paragraphs 2.4.b, 2.4.c, 2.5.b, 2.5.c and 2.5.f of Annex C to the Bid Evaluation Plan for the reasons submitted by PWGSC. In particular, the Tribunal is of the view that PWGSC's assessment that K-W failed to provide sufficient information in respect of paragraphs 2.5.b and 2.5.c and was insufficiently clear in respect of paragraph 2.5.f, is consistent with the requirements of the RFP. In the Tribunal's view, the corresponding RFP requirements were sufficiently clear.

However, the Tribunal is of the view that the evaluators improperly applied paragraph 2.4.e of Annex C to the Bid Evaluation Plan by including administrative functions, such as invoicing, in the production process and by disregarding K-W's submission regarding subcontractors under the section of its proposal entitled “Significant Subcontractors to be Utilized”.⁷

5. The paragraphs at issue are found in Annexes C and F to the Bid Evaluation Plan. Articles 5.1 and 5.6 of ISO 10005, which have been included as evaluation criteria in Annex F to the Bid Evaluation Plan, must be read in conjunction with the corresponding requirements of paragraphs 78.3(a) and (e) of the RFP.

6. See *Re Complaint Filed by ACMG Management* (5 June 2002), PR-2001-056 (CITT); see also *Re Complaint Filed By Crain-Drummond* (18 August 2000), PR-2000-009 (CITT).

7. Volume 2 of K-W's proposal at 49.

As for paragraph 2.5.g of Annex C to the Bid Evaluation Plan, the Tribunal is of the view that it was reasonable for PWGSC to expect some explanation by K-W on how it would deal with its backlog work and how it would ramp up production for the new contract. The Tribunal is satisfied that the information provided by K-W was lacking the “depth and quality” referred to in paragraph 78 of the RFP.

The same is not true of the additional information that PWGSC expected K-W to provide in its proposal under paragraph 2.5.i of Annex C to the Bid Evaluation Plan regarding the source and skill level of its employees and workforce expansion. This criterion does not match any of the requirements under paragraph 78.4 of the RFP.

The Tribunal is of the view that the specific evaluation criterion for assessing critical paths in paragraph 2.5.h of Annex C to the Bid Evaluation Plan is to the same effect. The Tribunal does not accept that the specific requirements listed in each of paragraphs 78.1, 78.2, 78.3 and 78.4 of the RFP were a series of enumerated minimum points and that the reference to “in depth and quality information” is a panacea for all other required information. The Tribunal is of the view that this specific requirement should have been listed separately under paragraph 78.4 of the RFP.

With respect to paragraph 2.5.j of Annex C to the Bid Evaluation Plan, the Tribunal is of the view that this criterion should not have been used for evaluation under paragraph 78.4 of the RFP, as no such requirement is detailed in that paragraph.

As for the requirement to schedule progress meetings, the Tribunal is of the view that the requirement is on an “as required” basis and, strictly speaking, is not required in the delivery plan and schedule. The Tribunal, therefore, is of the view that paragraph 2.5.l of Annex C to the Bid Evaluation Plan which, according to PWGSC, corresponds to paragraph 13 of the RFP, should not have been an evaluation criterion. Furthermore, if it was PWGSC’s intention to have these meetings included in the delivery plan and schedule, the Tribunal is of the view that it should have clearly stipulated the requirement under paragraph 78.4 of the RFP.

As for paragraph 2.5.m of Annex C to the Bid Evaluation Plan relating to progress reports, the Tribunal is of the view that they are a requirement for the contractor under paragraph 14 of the RFP. However, they were not included in the requirements detailed under paragraph 78.4 of the RFP and should not have been considered for evaluation.

With respect to the requirement for an organization chart under paragraph 2.5.n of Annex C to the Bid Evaluation Plan, the Tribunal is of the view that the RFP ought to have specifically stipulated the requirement in paragraph 78.4. Further, the Tribunal notes PWGSC’s reference to the requirement for an organizational structure under article 3.8 of ISO 10005 entitled “quality system”. In this respect, the Tribunal points out that the structure in question relates specifically to the resources needed to implement quality management and not to the entire corporate structure.

With respect to the quality assurance part of K-W's proposal under paragraph 78.3 of the RFP,⁸ as stated previously, the Tribunal will not typically substitute its judgement for that of the evaluators, particularly where the Tribunal is satisfied that the evaluators have correctly interpreted the requirement and reviewed the information, such as in this instance. In respect of paragraph 78.3(a), which relates to management responsibilities, the Tribunal notes that article 5.1 of ISO 10005 states that the quality plan "should identify individuals within the supplier's organization".

In light of the foregoing, the Tribunal finds that the complaint is valid.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that PWGSC set up an evaluation team comprised of new evaluators to conduct a re-evaluation. The proposals to be re-evaluated are those submitted by the four potential suppliers that were eligible for the evaluation process for the rated requirements in this solicitation. This re-evaluation is to be done for paragraph 2.4.e of Annex C to the Bid Evaluation Plan only, in accordance with the requirements set out in the RFP.

For purposes of further clarity, the evaluators conducting the re-evaluation are not to consider administrative functions (e.g. invoicing) as part of the production processes listed in paragraph 2.4.e of Annex C to the Bid Evaluation Plan. With respect to paragraphs 2.5.h, 2.5.i, 2.5.j, 2.5.l, 2.5.m and 2.5.n, the Tribunal recommends that the evaluators give the maximum scores to all proposals for these paragraphs, as these requirements were not specifically listed in paragraph 78.4 of the RFP. The Tribunal recommends this latter approach in order to maintain the total scoring scheme as is and to avoid the redistribution of the relative points to other paragraphs.

Following the re-evaluation, if K-W's proposal is determined to have the highest value/performance score according to the methodology set out in paragraph 82 of the RFP, the Tribunal recommends that the contract awarded to FELLFAB be terminated and that it be awarded to K-W. As an alternative to terminating the contract awarded to FELLFAB, should K-W be determined to have the highest value/performance score, the Tribunal recommends that PWGSC compensate K-W for the profit that it lost in being deprived of the contract. The basis for calculating the lost profit will be the price submitted by K-W in its proposal in response to Solicitation No. W8476-019901/A.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards K-W its reasonable costs incurred in relation to preparing and proceeding with this complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member

8. Volume 2 of K-W's proposal at 50.