



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Monday, March 8, 2004

File No. PR-2003-067

IN THE MATTER OF a complaint filed by IHS Solutions Limited 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 IHS Solutions Limited be compensated in the amount of \$1,830, representing an estimate of one twelfth of the profit that IHS reasonably would have made, had it been awarded the contract.

Ellen Fry

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Presiding Member

Michel P. Granger

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Date of Determination and Reasons: March 8, 2004

Tribunal Member: Ellen Fry, Presiding Member

Senior Investigation Officer: Cathy Turner

Counsel for the Tribunal: Marie-France Dagenais

Complainant: IHS Solutions Limited

Government Institution: Office of the Superintendent of Financial Institutions



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STATEMENT OF REASONS

COMPLAINT

On December 8, 2003, IHS Solutions Limited (IHS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. OSFI-BSIF 2003/001) by the Office of the Superintendent of Financial Institutions (OSFI) for the provision of Web site re-engineering and Web content management services.

IHS alleged that the OSFI improperly declared its proposal non-compliant with a mandatory criterion relating to completed projects. IHS submitted that several of its project descriptions contained a project end date referred to as “to present”. According to IHS, the OSFI concluded that, if the date was “to present”, the project was not complete and that, hence, IHS did not meet the mandatory requirement. IHS requested, as a remedy, that the Tribunal recommend that the OSFI re-evaluate the bids. In the alternative, IHS requested that the Tribunal recommend that the OSFI compensate it for lost opportunity.

On December 10, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On December 11, 2003, the OSFI informed the Tribunal that a contract had been awarded to i4design inc. On December 30, 2003, the OSFI filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ IHS filed its comments on the GIR with the Tribunal on January 13, 2004.

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 [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. S.O.R./91-499.

PROCUREMENT PROCESS

According to the OSFI, a Request for Proposal (RFP) for the provision of Web content management systems was issued on October 7, 2003. The closing date for the submission of proposals was November 17, 2003.

The RFP reads, in part, as follows:

PART III - EVALUATION CRITERIA AND METHODOLOGY

1.0 EVALUATION CRITERIA

1.1 Mandatory Criteria [as amended]

M4 The Bidder will describe its capacity and experience in this area, including listing up to five (5) successfully completed projects similar in size, scope and nature to which the Bidder has provided services. That similarity is described as:

- Providing Web site design and content management systems development or implementation and the attendant services to clients with similar requirements to those described in Part II – Statement of Work.

According to the OSFI, 12 proposals were received. Proposals were evaluated from November 18 to 28, 2003. The OSFI determined that IHS's proposal was non-compliant with mandatory criterion M4 of section 1.1.1.1 of the RFP (M4).

On December 3, 2003, the OSFI informed all bidders, including IHS, of the results of the evaluation and solicitation process. According to the OSFI, bidders whose proposals did not meet the mandatory requirements were also advised that the evaluation of their bids was discontinued, once the proposals had been deemed non-compliant.

On December 4, 2003, IHS contacted the OSFI to question why its bid had been judged non-compliant, since it had provided five client references. The OSFI replied that only one of IHS's five client reference forms indicated that the project had been successfully completed, as the duration of the other projects were listed as "Duration – Present". On December 8, 2003, IHS filed its complaint with the Tribunal.

POSITIONS OF PARTIES

IHS's Position

IHS submitted that all the projects listed in its proposal are complete and that many were completed in stages over several years. It submitted that projects were identified as "to present" because IHS has an ongoing relationship with the clients for maintenance and support services. IHS also submitted that the wording of its client references was intended to be clear and unambiguous and that the descriptions use language and verb tenses to signify that work has been not only completed but adopted by the organizations for whom the work was performed.

As an example, IHS submitted that, with regard to its reference pertaining to the Bank of Montreal, the project involved multiple phases and that its bid states the following: "The result of this customized development is a user friendly, cost efficient system for the Bank of Montreal's technical publications.

Productivity is up – the total number of documents has grown from 800 to 2,800 over the past three years”; and further states: “[t]he application is so popular and easy to use that other groups in the Bank are now looking at adding their documents to this Content Management System”.⁴ IHS argued that these references clearly indicate that the project has been completed, as it has been adopted and has increased productivity threefold.

Another example submitted by IHS is its reference pertaining to Anixter Inc. (Anixter), where the reference ends with the following: “Finally, IHS helped Anixter migrate this sophisticated content management solution to the Internet for clients to access it in January 2000”.⁵ IHS contended that it is clearly stated that the work was performed, completed and implemented. It submitted that the reference further sets out the benefits to the organization, such as eliminating service backlogs, reducing customer response times to seconds and offering search capabilities. IHS argued that, clearly, these types of benefits are difficult to realize in a system that has not been completed.

IHS submitted that, throughout its references, words such as “has”, “developed”, “allows” and so on more than imply that the work is complete. It argued that, should these references have read “will”, “is developing” and “will allow”, they may have implied that the work was not completed and, at the very least, should have prompted the contracting authority to ask for clarification. IHS further argued that the fact that the references, which are from very large North American organizations, were summarily dismissed due to IHS’s ongoing client relationship is unacceptable.

In response to the OSFI’s submission in the GIR alleging the inappropriate use of client reference sheets in its bid, IHS submitted that the RFP provided for the use of these sheets and that IHS listed each of its projects on a separate sheet. Regarding the OSFI’s submission that the projects submitted by IHS were not similar in size, scope and nature to the subject of the procurement, IHS argued that the term “similar” was not well defined in the RFP nor were any criteria provided that would enable a vendor to choose reference projects effectively. IHS submitted that the definition of “similar”, as provided by the OSFI in the GIR, is new and not contained in the RFP. It argued that the inclusion by the OSFI of the Government of Canada common look and feel criteria to qualify as a similar project is unfair to vendors that did not submit any Government of Canada reference projects. IHS also argued that, with respect to the OSFI’s submission that some of the references provided by IHS did not meet the similar-project criterion because the projects did not result in the client becoming self-reliant, “self-reliant” was never part of the RFP description of “similar”, as described in M4, or elsewhere in the RFP.

OSFI’s Position

The OSFI submitted that IHS failed to meet all the mandatory requirements of the solicitation. In particular, it submitted that, to be considered compliant under M4, bidders were to list and provide descriptions for up to five “successfully completed projects” that had requirements that were similar to the requirement stated in the solicitation. The OSFI argued that IHS did not list or describe “similar” “completed” “projects”; it instead provided “client reference sheets” that described the services that had been provided. However, four of the five projects submitted did not clearly demonstrate that the “projects” had been “successful” “completed” or were in fact “projects” that were “similar” in size, scope and nature to the requirement described in the solicitation. The OSFI submitted that the RFP very clearly stated that the onus was on the bidder to provide a response that clearly demonstrated that a requirement had been met.

4. Complaint at 7.

5. *Ibid.*

According to the OSFI, all the work for the project that is the subject of the procurement must be completed by the end of March 2004, and it was therefore imperative that the contractor have significant experience in the successful completion of projects, on budget and on time. Bidders were asked to demonstrate their experience and capabilities by describing “up to five (5) successfully completed projects similar in size, scope and nature to which the Bidder has provided services.” The OSFI submitted that the evaluation team considered “similar requirements” to be “projects that included Web-site redesign, Web Content Management System; (GOC) Common Look and Feel (CFL)/World Wide Web consortium (W3C); and bilingual. Plus projects that resulted in the client becoming self reliant (self supporting) rather than requiring continuous on-going support.”

In order to confirm the “success” of a project from the client’s perspective, including the capability of the bidder to meet budget and time constraints, the OSFI submitted that bidders were to provide client reference sheets. The completed sheets were to include a description of the following: “How Bidder Satisfied This Requirement” including “[t]he level of success of the implementation project in meeting time and budget constraints.” The OSFI submitted that the client reference sheets submitted by IHS did not address those issues. The OSFI argued that the “Scope and Description of the Client Requirement” and the “Solutions” for two of the client references submitted by IHS both described document management solutions rather than Web content management solutions/systems. Therefore, according to the OSFI, these “projects” were not considered to be similar requirements. Furthermore, the OSFI argued that, since the relationship between IHS and each client reference is currently ongoing, both solutions do not appear to have made either client self-reliant, which, according to the OSFI, does not meet the similar-project criterion stated in the solicitation.

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, are the *Agreement on Internal Trade*⁶ and the *North American Free Trade Agreement*.⁷

Article 506(6) of the *AIT* provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The 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.”

Article 1015(4)(d) of *NAFTA* provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”.

In its letter to IHS dated December 3, 2003, the OSFI did not specifically state why IHS’s bid was deemed non-compliant under M4. However, in the GIR, the OSFI gives two reasons for the disqualification

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

7. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

of IHS's bid. Firstly, the OSFI submitted that only one of the five client reference forms, the Dy 4 Systems Inc. (Dy 4) form, indicated that the project had been successfully completed, as the duration of the other four projects was listed as "Duration – Present". Secondly, the OSFI submitted that the projects for Anixter and the Department of National Defence (DND) were not "similar" because "both described document management solutions rather than web content management solutions/systems" and "since the relationship between IHS and each client reference is currently ongoing, both solutions do not appear to have made either client self reliant".⁸

Accordingly, the OSFI's submissions appear to indicate that, in its view, only one of the five client reference projects submitted by IHS, that is, Dy 4, complied with M4. It appears that the OSFI disqualified IHS's bid because it considered that M4 required bidders to submit five projects meeting the requirements of M4 (i.e. that a bidder could not comply with M4 if it submitted four projects or less meeting the requirements of M4). The Tribunal considers that this is an incorrect interpretation of the clear meaning of M4. M4 required bidders to list "up to five" projects that meet the requirements of M4. Therefore, the plain language of the RFP indicates that a bidder would satisfy M4 if it listed from one to five projects that meet the requirements of M4. Accordingly, even if the OSFI was correct in considering that only one of the five projects submitted met the requirements of M4, it was incorrect in disqualifying IHS's bid under M4.

With respect to the OSFI's submission that four of IHS's projects were not "completed", the Tribunal was mindful of the principles outlined in *Polaris*:⁹

In its complaint, *Polaris* submitted, among other things, that it was not awarded sufficient points in respect of several aspects of its proposal. After having reviewed the evidence on the file, the Tribunal sees no reason to conclude that *Polaris*'s proposal was not evaluated in accordance with the criteria and methodology set out in the solicitation documents or that the evaluators did not apply their minds to these items at the time of the evaluation. In the absence of evidence that the evaluation was not conducted in a procedurally fair manner, the Tribunal normally defers to the judgement of the evaluation team as to the assignment of points for the rated technical requirements.¹⁰

Although, in the Tribunal's opinion, IHS's bid could have been worded more clearly, the Tribunal considers that the OSFI ignored or overlooked important information contained in IHS's proposal in at least two instances when it interpreted the client reference sheets to mean that the projects submitted had not been completed. Accordingly, the Tribunal does not consider it appropriate to defer to the judgement of the evaluators in this instance.

In the reference sheet pertaining to the Bank of Montreal, IHS submitted that it "worked closely with the Bank of Montreal's team in two phases, moving their technical publications from the mainframe to a client server environment, and then to a web-based Intranet application. Next, IHS built new applications . . . Four databases were created . . . IHS then developed a software interface . . . The result of this customized development is a user friendly, cost efficient system . . . The application is so popular and easy to use that other groups in the Bank are now looking at adding their documents to this Content Management System." In the reference sheet pertaining to DND, IHS submitted that it "developed a new content management system . . . This solution provides state-of-the-art functionality . . . The system is used by locations across Canada . . . DND training staff are able to edit and create new training manuals . . . This sophisticated, integrated solution allows editing and use of the content by DND staff across Canada."

8. GIR, para. 29.

9. *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT).

10. *Ibid.* at 6.

Clearly, the proposal indicated that these two projects had been completed, even though the relationship with the client may be ongoing. Therefore, the Tribunal considers that the OSFI was incorrect in disqualifying these two projects on the basis that they were not “completed”.

With respect to the OSFI’s position that the Anixter and DND projects were not “similar” to the project that is the subject of the procurement, the Tribunal considered whether the OSFI used appropriate criteria to assess similarity. The OSFI submitted that the evaluation team considered “similar requirements” to be “projects that included Web-site redesign, Web Content Management System; (GOC) Common Look and Feel (CFL)/World Wide Web consortium (W3C); and bilingual. Plus projects that resulted in the client becoming self reliant (self supporting) rather than requiring continuous on-going support.” There is no evidence to indicate that these criteria were communicated to bidders prior to bid closing.

Applying these criteria, the OSFI considered that the Anixter and DND projects failed to demonstrate a “web content management system” or the client becoming self-reliant rather than requiring continuous ongoing support and, hence, did not fulfill the requirements of M4. The Tribunal needs to consider whether using these criteria to assess whether projects are “similar” is permitted by the RFP.

“Web content management system” is clearly contemplated as an element of similarity by the wording of M4. Accordingly, the Tribunal does not consider that the OSFI was incorrect in applying this criterion.

However, the RFP does not specify that client self-reliance is to be part of the determination that projects are “similar”. The question is whether nonetheless it is appropriate to interpret the RFP as imposing this requirement. Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA* require that the solicitation documents specify clearly the criteria that will be used in the evaluation of proposals. Furthermore, the Tribunal notes that M4 requires the client reference projects to be “*similar*” in size, scope and nature to the project that is the subject of the procurement rather than to meet the more demanding standard of being “*the same*”. In light of the foregoing, the Tribunal considers that the lack of clarity in the “similarity” requirement should be addressed in a way that gives the bidders the benefit of the doubt. Accordingly, the Tribunal considers that the OSFI’s use of client self-reliance as a criterion for evaluating “similarity” was not permitted by the RFP and that it was incorrect in disqualifying the Anixter and DND projects based on this criterion.

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

The Tribunal notes that, given that M4 was amended to remove the requirement that two projects be for services provided to a “Government of Canada Department or Agency”, use of the common look and feel (an element that could only have been part of Government of Canada projects) as an element for evaluating “similarity” is not supported by the wording of the RFP. However, this requirement was not an issue in the assessment of the client reference projects submitted by IHS. The Tribunal also notes that the OSFI submitted that IHS was technically non-compliant because its response to M4 “was not submitted in accordance with the bidder instructions at Article 2.2 Technical Requirements of Part 1 of the RFP”. This provision of the RFP contains instructions on how to format bids, rather than instructions on content. Although the OSFI considered that IHS’s bid did not follow the required format, it did not disqualify the bid on that basis. Therefore, the Tribunal did not need to consider whether the OSFI was correct in considering that the requirements of Article 2.2 were not followed.

In recommending a remedy, the Tribunal considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*. IHS requested, as a remedy, that the Tribunal recommend that the OSFI re-evaluate the bids. In the alternative, IHS requested that the Tribunal recommend that the OSFI compensate it for lost opportunity.

It is fundamental to this procurement process and the integrity of the competitive procurement system generally that the government institution follow the evaluation criteria established in the RFP. The OSFI did not do this. As a result, not only IHS, but potentially all of the 12 bidders, may have been prejudiced. The Tribunal notes that it also found to be valid a complaint by a second bidder¹¹ that the OSFI failed to follow the criteria in the RFP. However, the evidence does not indicate that the OSFI acted in bad faith.

The Tribunal notes that the contract has been awarded and that the OSFI has indicated that the work is to be completed by the end of March 2004. Therefore, it appears that, at this point, a significant portion of the work will have already been completed. Accordingly, it would not be appropriate to recommend that the bids be re-evaluated or that the contract be re-tendered.

It is impossible to predict what the results of the procurement would have been, had the bids been evaluated according to what was permitted by the RFP. This is particularly so in light of both the ambiguity of the “similarity” requirement in M4 and the large number of bidders.

In light of the foregoing, the Tribunal recommends that IHS be compensated in the amount of \$1,830,¹² representing an estimate of one twelfth of the profit that IHS reasonably would have made, had it been awarded the contract.

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 IHS be compensated in the amount of \$1,830, representing an estimate of one twelfth of the profit that IHS reasonably would have made, had it been awarded the contract.

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Presiding Member

11. *Re Complaint Filed by AppDepot Web Services Inc.* (8 March 2004), PR-2003-069 (CITT).

12. For this purpose, an estimated profit level of 15 percent of the value of the contract (excluding GST) was used.