



**BY FACSIMILE**

July 29, 2004

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**Re: Solicitation Number W8485-03GH10/B  
DAC Aviation Internationale Ltée (File No. PR-2004-023)**

The Canadian International Trade Tribunal (the Tribunal) (Panel: Richard Lafontaine, Presiding Member; Pierre Gosselin, Member; Ellen Fry, Member) has reviewed the complaint submitted on behalf of DAC Aviation Internationale Ltée (DAC) and has decided not to initiate an inquiry into this complaint.

Subsection 7(1)(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (the Regulations) reads, in part, that the Tribunal shall, within five working days after the day on which the complaint is filed, determine whether “the information provided by the complainant ... discloses a reasonable indication that the procurement has not been carried out in accordance with whichever one of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade or the Agreement on Government Procurement applies”. In this procurement only the Agreement on Internal Trade (AIT) applies.

DAC alleged that the Department of Public Works and Government Services (PWGSC) improperly rejected its proposal as non-compliant. On July 8, 2004, DAC received a letter from PWGSC informing it that its proposal “was found to be non-compliant against the requirements of RFP Part 1, Article B2.2(d) – “Section 1 Response to Part 1 and Part 2 Terms and Conditions of the RFP Document Content Requirements” . . . [t]here are a total of fifty seven (57) Terms and Conditions . . . your proposal provided a compliance matrix for the Terms and Conditions, but for only the first fifty two (52) Terms and Conditions and not the complete fifty seven (57) Terms and Conditions”. The Tribunal is of the view that, while DAC disputes the effect that the omission in its proposal should have had, it does not dispute the fact that its proposal failed to explicitly address their compliance to terms 53, 54, 55, 56 and 57 contained on pages 28 and 29 of 29 in Part 2 of the RFP. The Tribunal finds that the requirement to address compliance to each term and condition is clearly stated at Article B2.2(d) on page 13 of 18 of Part 1 of the RFP, and that this requirement is a mandatory requirement by virtue of the use of the word shall. Article C1.1(d) at page 17 of 18 of part 1 of the RFP reads:

Proposals will be evaluated on the basis of compliance to mandatory requirements relating to the RFP document. The word **MUST**, **WILL** and **SHALL** indicates a **MANDATORY** requirement. Proposals not complying with all the **MANDATORY** requirements of this RFP will not be given further consideration.

The Tribunal is of the opinion that the consequences of not complying with a mandatory requirement were clear and afforded no discretion on the part of PWGSC.

The Tribunal is of the view that the information submitted with the complaint indicates that PWGSC evaluated DAC's proposal in a manner consistent with the wording of the RFP. Therefore, the Tribunal finds that DAC's complaint does not disclose a reasonable indication that the procurement has not been carried out in accordance with Chapter five of the AIT, as contemplated by subsection 7(1)(c) of the Regulations.

With respect to DAC's contention that PWGSC had an obligation to clarify its proposal, the Tribunal is of the view that no such obligation existed. Article A15.0 of the RFP indicates that: "[a]fter RFP closing date, no amendment to the proposals will be accepted[.] However, during the evaluation, members of the Evaluation Team may, at their discretion, submit questions or conduct interviews with Bidders to obtain clarification". The Tribunal finds that, in accordance with the terms of the RFP, evaluators had the discretion to clarify a proposal during the evaluation of bids, however, this process was not obligatory. Moreover, the Tribunal is of the opinion that a correction to the compliance matrix in issue after bid closing, even through a clarification process, would have constituted an amendment, contrary to the terms of the RFP. Thus, if accepted, it would have been a violation of the AIT.

With respect to DAC's correspondence of July 28, 2004, and the contention that "the Government Institution will award the contract to ACRO Aerospace Inc.", the Tribunal's above decision would not preclude the filing of a future complaint should DAC learn that a contract has been awarded in a manner that is in contravention of any applicable trade agreements.

In light of the above, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

Yours sincerely,

Susanne Grimes  
Acting Secretary