



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2005-010

SNC Technologies Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Friday, September 16, 2005*

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IN THE MATTER OF a complaint filed by SNC Technologies 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*.

**BETWEEN**

**SNC TECHNOLOGIES INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by SNC Technologies Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

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Meriel V. M. Bradford  
Presiding Member

Patricia M. Close  
Patricia M. Close  
Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Hélène Nadeau  
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## STATEMENT OF REASONS

### COMPLAINT

1. On June 20, 2005, SNC Technologies Inc. (SNC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. EP243-020059/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of the services of contractors to market and sell surplus military assets.

2. SNC alleged that PWGSC failed to properly evaluate its proposals by taking into consideration information not included in its proposals. SNC requested, as a remedy, that the Tribunal recommend that PWGSC award the designated contracts to SNC. In the alternative, it requested that the Tribunal recommend that PWGSC compensate it for its bid preparation costs and its lost profit. SNC also requested its costs incurred in preparing and proceeding with the complaint.

3. On June 27, 2005, 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*.<sup>2</sup>

4. On June 29, 2005, PWGSC informed the Tribunal that no contracts had been awarded with regard to the solicitation at issue. On July 7, 2005, the Tribunal granted intervener status to Smith Consulting Group (SCG). On July 22, 2005, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with paragraph 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On August 3 and 5, 2005, respectively, SCG and SNC filed their comments on the GIR.

5. 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, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaint on the basis of the written information on the record.

### PROCUREMENT PROCESS

6. According to PWGSC, Solicitation No. EP243-020059/B for the provision of the services of contractors to market and sell surplus military armament, ammunition and equipment was published on MERX, Canada's electronic tendering service, on November 19, 2004, with an original closing date of December 6, 2004, which was subsequently amended to January 10, 2005, and then to February 15, 2005.

7. PWGSC submitted that, in response to the Request for Proposal (RFP), 11 proposals were received from 2 bidders. SNC submitted proposals with respect to the requirements for commodity groups 1 through 10, except for commodity group 6. SCG, another bidder, submitted proposals with respect to commodity groups 4 and 5. No proposals were received for commodity group 6. On March 2, 2005, the collective assessment of the proposals received was completed. All 9 proposals submitted by SNC were evaluated as compliant with respect to the technical requirements of the RFP.

8. According to SNC, on March 4, 2005, two sales representatives left the employment of SNC. On March 9, 2005, PWGSC initiated the process for departmental approval of the award of contracts for nine

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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 [*Rules*].

commodity groups to SNC. According to PWGSC, on March 11, 2005, prior to the finalization of the procurement process and before contract award, PWGSC received communication from one of the individuals proposed by SNC as a sales representative informing it that he and the other proposed sales representative were no longer employed by SNC. On March 21, 2005, PWGSC sought confirmation from SNC regarding the availability of these individuals. Between March 21 and 24, 2005, PWGSC and SNC engaged in an exchange of e-mails regarding the availability of the two proposed resources.

9. On April 13, 2005, PWGSC advised SNC that all its proposals were deemed non-compliant. On April 22, 2005, a debriefing was held during which PWGSC explained the basis of its evaluation of SNC's proposals. On April 27, 2005, SNC filed an objection with PWGSC on the evaluation of its proposals and, on June 6, 2005, PWGSC responded to the objection. On June 16, 2005, SNC requested that PWGSC reconsider its decision and, on June 17, 2005, PWGSC responded that it would not provide any further comment on SNC's objection. On June 20, 2005, SNC filed its complaint with the Tribunal.

## POSITIONS OF THE PARTIES

### SNC's Position

10. SNC submitted that PWGSC relied on information from a third party that was not included in its proposals and only arose after bid closing, and used this information to improperly modify the substance of SNC's proposals. It submitted that the evaluation of its proposals had already been completed by the time PWGSC received the third-party information. In its comments on the GIR, SNC submitted that the subsequent decision by the contracting authority, who, it submitted, was not a member of the evaluation team, to deem the proposals non-compliant was inconsistent with Articles 501 and 506(6) of the *Agreement on Internal Trade*,<sup>4</sup> which requires the evaluation of proposals to be conducted in accordance with the terms of the RFP.

11. SNC submitted that the general rule governing the evaluation of proposals is that evaluators must make their decisions on the basis of the information contained in the proposals before them. It submitted that in *Southern California*, the Tribunal observed the following:

While, in limited circumstances, evaluators are permitted to seek the clarification or verification of information contained in proposals, they are generally required to make decisions on the basis of what is contained in the proposals before them.<sup>5</sup>

12. SNC submitted that the prohibition against substantive modifications to proposals after bid closing is intended to ensure that all bidders are treated fairly and given the same amount of time to prepare their best proposals so that the information that they contain is "frozen" at the moment of bid submission. SNC submitted that, if a bidder were permitted to amend its proposal after bid closing to include new information that was advantageous to its proposal, this would be unfair to other bidders whose proposals had already been submitted. SNC submitted that, by necessary inference, information that is potentially prejudicial to a bidder and that only arises after bid closing cannot be used to disadvantage that bidder's proposal.

13. SNC submitted that, in order to accommodate events that occur after bid closing, the Tribunal, in *Mechron*, adopted a bifurcated system for assessing compliance, distinguishing the concepts of "proposal compliance" from "contract compliance".<sup>6</sup> Following *Mechron*, SNC submitted that proposal verification

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4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

5. *Re Complaint Filed by Southern California Safety Institute, Inc.* (22 December 2003), PR-2003-047 (CITT) at 7.

6. *Re Complaint filed by Mechron Energy Ltd.*, (18 August 1995), PR-95-001 (CITT) at 9.

must be restricted to information that existed on the date of bid closing and that the assessment of bids must entail determining whether the information being verified was accurate on the date of bid closing. SNC further submitted that, in contrast to verifying proposal compliance, assessing contract compliance involves an assessment of a contract awardee's compliance with the terms of the resulting contract during performance. Unlike proposal compliance, contract compliance is dynamic and assessed based on all the circumstances existing at the time of the assessment.

14. In its comments on the GIR, SNC referred to a Supreme Court of Canada (the Court) case, *Ontario v. Ron Engineering and Construction (Eastern) Ltd.*,<sup>7</sup> arguing that it would be patently unfair to take into consideration information that did not exist at the time that the proposals were submitted. SNC also referred to *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*<sup>8</sup> SNC submitted that, in the case now before the Tribunal, a term included in the RFP that purports to confer discretion on PWGSC to conduct a verification of proposal compliance at any time, even after contract award, is analogous to a privilege clause. It further submitted that, as determined by the Court, a privilege clause cannot be interpreted to give the tendering party the discretion to award a contract to a non-compliant bidder if doing so would be inconsistent with the rest of the tender documents. SNC argued that, in the present case, a right to verify information provided by a third party after bid closing and bid evaluation would be not only inconsistent with the other terms of the RFP, but also inconsistent with the obligations under the *AIT*. It submitted that a proper interpretation of the verification provisions of the RFP do not permit PWGSC to verify information furnished by a third party that arose after the parties' rights crystallized on bid closing.

15. SNC submitted that it included with its proposals a certification stating that, should it be requested to provide services under a resulting contract, the persons who it proposed would be available to commence the performance of the work. SNC submitted that the certification was accurate on the day on which it was made and remained accurate through the completion of the scoring of technical proposals. It further submitted that the fact that the two sales representatives left SNC after bid closing is not relevant to the issue of proposal compliance and that, while it was appropriate for PWGSC to verify that the certification was accurate as of bid closing, PWGSC erred by using information from outside its proposals to deem the proposals non-compliant. SNC submitted that acceptance of a non-employee certification based on the change of employment status of the sales representatives after bid closing would have constituted impermissible bid repair. It further submitted that the rules against bid repair prevented SNC from substituting other sales representatives from within the company; however, it submitted that PWGSC was apparently willing to allow it to engage the services of the new company that employed the former sales representatives or the former sales representatives themselves.

16. In response to PWGSC's allegation that SNC's objection to the RFP provision of verification during the evaluation process is untimely, SNC submitted in its comments on the GIR that information about the improper verification was not communicated to it until the debriefing held on April 22, 2005. It contended that it objected to the verification within 10 working days of the meeting and filed a complaint within 10 working days after PWGSC denied the relief requested in the objection letter. It further submitted that permissive terms of an RFP allow, but do not require, PWGSC to engage in conduct that may or may not be inconsistent with the trade agreements. SNC argued that, in such circumstances, the breach of a trade agreement does not occur until PWGSC takes action that is inconsistent with the trade agreement and that a complaint filed prior to PWGSC engaging in inconsistent conduct would be premature.

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7. [1981] 1 S.C.R. 111 [S.C.C.].

8. [1999] 1 S.C.R. 619 [S.C.C.].

17. SNC submitted that the contract terms, included as part of the terms of the RFP, provide a mechanism for dealing with situations where a resource proposed to perform work under a contract becomes unavailable. The resulting contract provisions of the RFP include the clause titled “Replacement of Personnel”, which is found in the Standard Acquisition Clauses and Conditions (SACC) manual which is incorporated by reference into the RFP. SNC submitted that PWGSC could have negotiated the replacement of acceptable sales representatives, under the terms of the RFP, in the resulting contracts.

### **PWGSC’s Position**

18. PWGSC acknowledged that SNC proposed its sales representative resources in good faith and that, at the time of bid closing, the completed status and availability of resources certifications were *bona fide*. However, it submitted that the provisions of the RFP regarding the mandatory certification of status and availability of resources specifically contemplate the verification of such certification during the evaluation process, after bid closing; therefore, failure to confirm having the written permission to propose non-employees and provide certification for them during the evaluation process must render a bidder’s proposal non-compliant. PWGSC further submitted that it is not logical to argue that its obtaining verifying information in regard to a bidder’s proposal during the evaluation process is improper, when the RFP specifically contemplates it.

19. PWGSC submitted that, although it was prompted to verify SNC’s proposals as a result of receiving communication from one of the individual resources proposed, SNC’s proposals were evaluated solely on the basis of information received directly from SNC in the context of the verification. It submitted that it would have been improper for it to have ignored the information provided by the proposed resource and that, had the contract been awarded to SNC without verification of the availability of the resources, it is likely that such conduct would have led to a potential challenge by parties other than SNC.

20. With respect to SNC’s objection to the RFP provision of verification during the evaluation process, PWGSC submitted that it is untimely. PWGSC submitted that the RFP specifically provides for a verification procedure during the “evaluation process” and specifies that the evaluation process is “prior to contract award”. It further submitted that the time to complain in regard to this process had long expired, given that seven months had elapsed after publication of the RFP and four months after bid closing.

21. Regarding SNC’s allegation that the contract terms, provided as part of the terms of the RFP, provide a mechanism for dealing with situations where a resource proposed to perform work under a contract becomes unavailable, and its contention that the provisions of the SACC manual are applicable in the current circumstances, PWGSC submitted that this contention has no merit by virtue of the fact that the clause referenced by SNC, “Replacement of Personnel”, is only applicable to contracts, to permit replacement of resources after contract award when, for reasons beyond the contractor’s control, the persons named in the contract are unable to provide the contracted services. PWGSC further submitted that the contractual clauses in the SACC manual do not operate to permit bid repair and are not relevant to the circumstances of this case.

22. PWGSC submitted that, in the case of *Southern California*, the Tribunal made the referenced statement in the context of determining whether a bidder’s reference in its proposal to evidence from extraneous sources, such as Web sites, ought properly to be considered by evaluators. PWGSC argued that such a factual context is distinguishable from the circumstances of the present case and that the verification at issue concerns only information actually contained in SNC’s proposals and not extraneous information. With respect to *Mechron*, PWGSC submitted that the Tribunal’s comments in that case do not restrict the time of the assessment of the accuracy of proposals to the time of bid closing, especially when subsequent



verification is contemplated by the tender documents. Rather, it was PWGSC's contention that the Tribunal's comments in *Mechron* limit the time of the evaluation of the compliance of a proposal to the period prior to contract award and reject the suggestion that the ultimate determination of proposal compliance is made at the time of acceptance testing, after contract award.

23. Finally, PWGSC requested its costs incurred in responding to the complaint.

### **SCG's Position**

24. SCG, an intervener in this case, submitted that bidders on this procurement fully understood the absolute need for compliance with all the requirements set forth in the RFP. It submitted that the certification of team members is paramount in proposals submitted for such requirements. It further submitted that PWGSC acted fairly towards all bidders.

### **TRIBUNAL'S ANALYSIS**

25. 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*.

26. Article 501 of the *AIT* provides in part the following: "the purpose of this Chapter [Procurement] is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

27. 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."

28. The Tribunal will first address PWGSC's interpretation of SNC's objection with respect to the RFP provisions regarding verification during the evaluation process being contrary to the *AIT*. PWGSC submitted that this complaint is untimely and that the time to complain with respect to this section of the RFP has long since passed, given that the RFP closed on February 15, 2005.

29. The section of the RFP that is relevant reads in part as follows:

#### **3.0 Proposal Preparation Instructions**

Compliance with the certifications the Bidder provides to Canada is subject to verification by Canada during the proposal evaluation period (*prior to contract award*) and after contract award. The Contracting Authority shall have the right to ask for additional information to verify the Bidder's compliance to the applicable certifications *before award of a contract*. *If it is determined that any certification made by the Bidder is untrue, whether made knowingly or unknowingly, or any failure to comply with the certifications or comply with the request of the Contracting Authority for additional information will render the proposal non-responsive.* [Emphasis added]

30. The RFP was published on November 19, 2004, and bids closed on February 15, 2005. In order to be considered timely, SNC would have to have filed an objection or a complaint to this section of the RFP within 10 working days of February 15, 2005, at the latest. The Tribunal notes that SNC's objection was filed with PWGSC on June 16, 2005, and that the complaint to the Tribunal was filed on June 20, 2005. In view of these dates, the Tribunal agrees with PWGSC that an objection or a complaint concerning whether the provisions of the RFP contravened the *AIT* is untimely at this stage.

31. The Tribunal now turns to SNC's allegation that PWGSC failed to properly evaluate its proposals by taking into consideration information not included in its proposals.

32. SNC argued that PWGSC had already completed its evaluation of SNC's proposals by the time the third-party information was provided to PWGSC and that it was patently unfair to take into consideration information that did not exist at the time that proposals were submitted. While PWGSC acknowledged that SNC proposed its sales representative resources in good faith, it argued that it would have been improper for it to have ignored the information provided by the third party.

33. Clause 2.4 of Annex C of the RFP, "The Status and Availability of Resources" reads in part as follows:

The Bidder certifies that, should it be requested to provide services under any contract resulting from this solicitation, the persons proposed in its proposal shall be available to commence performance of the Work as required by the Project Authority and at the time specified herein or agreed to with the Project Authority.

34. At the time that SNC submitted its proposals, the two sales representatives in question were employees of SNC and the certification provided by SNC with its proposals was valid in that regard. On March 2, 2005, PWGSC evaluated SNC's proposals and, on March 9, 2005, initiated, but did not complete, the approval process for the contract award, prior to seeking verification from SNC on March 21, 2005, regarding the availability of the two resources in question. The Tribunal is of the view that, according to the terms of the RFP set out in paragraph 29 above, PWGSC had the authority to verify, prior to contract award, a bidder's compliance with the certifications provided with its proposal and to ask for additional information to verify that a bidder's certification is valid up until the time of the contract award. Such verification, in the Tribunal's view, does not constitute bid repair in this case.

35. Between March 21 and 24, 2005, PWGSC sought to verify that the certification provided by SNC with its proposals was still valid, when it inquired whether SNC's proposed sales representative resources would be available to perform the services. In reply, SNC confirmed that the two individuals in question were no longer employees of SNC and that a decision as to whether their services would be required would be made at a later date.<sup>9</sup> Given that SNC would "no longer be able to certify the availability of the proposed resources",<sup>10</sup> PWGSC declared the bid non-responsive. The Tribunal finds that PWGSC acted within the parameters of paragraphs 2.4 and 3 of the RFP when it found SNC's proposals non-compliant.

36. In light of the above-mentioned RFP provisions with respect to certification of availability of resources, the Tribunal finds that PWGSC conducted the evaluation in accordance with the terms of the RFP and that it did not breach Articles 501 and 506(6) of the *AIT*.

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9. GIR (confidential), Exhibit 6.

10. GIR at 12, para. 22.

37. Finally, the Tribunal turns to SNC's submission that the contract terms, included as part of the terms of the RFP, specifically the clause titled "Replacement of Personnel", provide for the negotiation of replacement resources after contract award. The Tribunal finds that the clause "Replacement of Personnel" deals with matters after contract award, which are beyond the Tribunal's jurisdiction and, accordingly, will not deal with this issue.

38. In light of the foregoing, the Tribunal determines that SNC's complaint is not valid.

39. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline* (Level 2). The procurement was moderately complex, as it involved the provision of the services of contractors to market and sell surplus military assets in various commodity groups. The complaint was also moderately complex, as it dealt with issues surrounding the evaluation process. However, the complaint proceedings were straightforward, as the inquiry process followed the normal 90-day time frame and no motions were filed. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

#### DETERMINATION OF THE TRIBUNAL

40. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

41. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by SNC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

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