Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-004

Mircom Technologies Ltd.

v.

Department of Public Works and Government Services

Determination and reasons issued
Tuesday, July 11, 2006

Canada

TABLE OF CONTENTS

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

BETWEEN

MIRCOM TECHNOLOGIES LTD. **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 Mircom Technologies Ltd. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is $1,000. 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 by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On April 12, 2006, Mircom Technologies Ltd. (Mircom) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[1] The complaint concerned the procurement (Solicitation No. W8482-054541/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for repair and overhaul (R&O) services in support of the Damage Control System (DCS) of the Halifax-class frigates, the Fire Detection, Suppression, Alarm and Control System (FDSACS) of the Iroquois-class destroyers and two shore-based DCS trainers.

2. Mircom alleged that PWGSC improperly declared its proposal non-compliant. Specifically, it alleged that, upon not finding the required information in one part of its proposal, PWGSC did not examine the remaining portions of the proposal where that information was located. It requested that the awarded contract be rescinded and that its proposal be reconsidered without reference to the alleged deficiency in information.

3. On April 20, 2006, the Tribunal informed the parties that it had accepted the complaint, 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 May 15, 2006, PWGSC submitted the Government Institution Report (GIR) to the Tribunal. On May 24, 2006, Mircom submitted its comments on the GIR.

4. 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 written information on the record.

PROCUREMENT PROCESS

5. The Notice of Proposed Procurement was posted on MERX[3] on December 8, 2005, with a deadline for the receipt of bids of February 1, 2006.

6. According to PWGSC, four bids were received, including the one submitted by Mircom. After the evaluation by the DND technical evaluation team, two bids were declared compliant. Mircom's proposal was deemed non-compliant, as it did not meet the mandatory requirement regarding corporate experience.

7. Paragraph 3.2 of the Technical Evaluation Plan, attached as Annex D to the RFP, described the corporate experience requirement as follows:

> Corporate Experience: To demonstrate corporate experience with electronic projects as discussed below, bidders are to provide a brief description of the projects, responsibilities of the key personnel involved, the project duration, the dollar value and the client for whom the work was performed along with client contact person and phone number.
>
> 3.2.1 The Bidder must have a minimum of six months of demonstrated experience in the overhaul, installation and setting to work of electronic components including circuit cards within the last five years.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Canada's electronic tendering service.

8. Clause 2.1 of Annex E to the RFP, the "Evaluation Procedures and Criteria", described the evaluation process, which read as follows:

> **MANDATORY REQUIREMENTS**: Only proposals that meet all of the mandatory requirements will be considered for evaluation of the point rated criteria. Should any of the requirements under this section be omitted from the *proposal*, it will be deemed as non-responsive and will be given no further consideration.
>
> . . .

I. Corporate—Mandatory Requirements	Met	Not Met
The Bidder must have a minimum of six months of demonstrated experience in the overhaul, installation and setting to work of electronic components including circuit cards within the last five years.		

> . . .
>
> [Emphasis added]

9. On March 9, 2006, a contract was awarded to Siemens Canada Limited of Dartmouth, Nova Scotia. On March 13, 2006, PWGSC advised Mircom that the contract had been awarded. On March 14, 2006, Mircom contacted PWGSC and was informed by the contracting officer that its proposal had been disqualified because it did not meet the RFP's mandatory corporate experience requirement. Mircom attended a debriefing given by PWGSC on April 4, 2006.

10. On April 12, 2006, Mircom filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Mircom's Position

11. Mircom submitted that it had contacted PWGSC the day after being informed that the contract had been awarded to Siemens Canada Limited and had been advised by the contracting officer that ". . . she disqualified Mircom upon reading the first section of [its] submission ('Corporate Experience') because [Mircom] did not specifically state that [it] had experience 'repairing circuit boards' . . . ."[4] It also submitted that the contracting officer then ". . . indicated that at that point she did not have discretion to read the rest of the submission as Mircom was automatically disqualified for failing to provide mandatory information . . . ."[5]

12. Mircom submitted that this was unreasonable, given that PWGSC was familiar with the previous maintenance work on the DND assets in question of one of its proposed resources and that its corporate experience indicated that it designed, developed and manufactured advanced fire systems, which, according to Mircom, implied its ability to repair and service circuit boards comprising part of those systems. It also indicated that the personnel review section of its submission stated that its staff had experience in repairing circuit boards, including the circuit boards in issue.

13. Mircom submitted that employee experience can be evaluated as corporate experience and that corporate experience must reasonably include the sum total of the experience of its personnel.

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4. Mircom's procurement complaint form, section 5F.
5. *Ibid*.

14. Mircom submitted that its proposal included, in the corporate experience section, the fact that it had acquired a product line from Securiplex Inc. (Securiplex), the incumbent R&O contractor for the DCS and FDSACS in question, as well as the fact that it had hired key personnel, including two people who had been working with ". . . the department of defence, military and DCS for R&O for **greater than ten years** . . . ".[6]

15. Specifically regarding circuit board repair, the personnel experience section of Mircom's technical proposal indicates that all three of its proposed resources have ". . . greater than five (5) years experience in the: (i) overhaul, installation and setting to work of electrical components including circuit cards; . . . (iii) installation and setting [to] work of electronic components including circuit cards; . . . (v) fault finding, repairing and programming an electronic control system and components including circuit cards . . . ."[7]

16. Finally, Mircom submitted that its complaint was made in good faith and with the expectation of a favourable response and that PWGSC should not be awarded its costs were the Tribunal to find in PWGSC's favour.

PWGSC's Position

17. PWGSC submitted that Mircom's proposal had been properly evaluated and declared non-compliant. It submitted that the complaint was without merit and ought to be dismissed. It requested that it be awarded its costs in this matter, as set out in the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*).

18. PWGSC submitted that Securiplex, the sole entity which had previously performed R&O on the DCS and FDSACS in the Halifax- and Iroquois-class ships, had advised DND that it was being closed by its parent organization and would not be able to provide the necessary services beyond the end of the previous contract. It noted that Securiplex had attempted to find a buyer for the data package and intellectual property rights for these systems, but that none had been found; therefore, DND acquired them on March 30, 2005. It noted that Mircom had acquired a product line from Securiplex in 2005, but not the equipment that was the subject of the RFP. PWGSC submitted that at no time had Mircom performed R&O services on the DCS and FDSACS in question.

19. PWGSC submitted that, although Mircom indicated that it had hired individuals with R&O experience, the evaluators properly determined that there was nothing in its proposal to demonstrate that the firm had the required ". . . six months of demonstrated experience in the overhaul, installation and setting to work of electronic components including circuit cards within the last five years . . . ."[8] It submitted that the requirement for relevant corporate experience is distinguishable from the requirement for relevant experience of the firm's proposed personnel. It submitted that requiring corporate experience in R&O was both necessary and reasonable in order to carry out and manage the R&O responsibilities of the scope of the work detailed in the RFP. It submitted that merely hiring individuals who have performed R&O services in the past provides no assurance that the firm, as a business entity, has the corporate experience, management skills, facilities and infrastructure to properly apply the skills to conduct the work to the standard required. PWGSC submitted that, for this reason, the RFP included the requirement to evaluate the firm's past experience.

6. Mircom's proposal at 8.
7. *Ibid*. at 11.
8. Clause 2.1 of Annex E to the RFP.

20. PWGSC acknowledged that, as part of its proposal, Mircom had indicated that it had experience in "development" or "research" projects. However, it submitted that no examples of R&O projects were provided under the proposal's summary of projects, nor was any information provided regarding the responsibilities of the key personnel involved in these projects.

21. PWGSC submitted that the design and manufacture of a product or product line is distinguishable from carrying on the business of an R&O facility. It submitted that R&O requires a facility where an item is returned to a serviceable condition by disassembly, repair or replacement of damaged or deteriorated parts, reassembly, adjustment, examination and testing to specific standards. It noted that, whereas repair normally entails the correction of specific details only, overhaul entails the replacement of not only worn and damaged parts but also parts whose service life has expired or is about to expire.

22. The RFP contained a note to bidders, which stated the following:

> LISTING EXPERIENCE WITHOUT PROVIDING ANY SUPPORTING DATA TO DESCRIBE WHERE AND HOW SUCH EXPERIENCE WAS OBTAINED WILL RESULT IN YOUR BID BEING CONSIDERED NON-RESPONSIVE.[9]

PWGSC submitted that, having regard to these clear RFP instructions to provide comprehensive detailed and complete submissions, specifically relating to past corporate experience in overhaul, installation and setting to work of electronic components, including circuit cards, over the requisite time period, it had no choice but to declare Mircom's proposal non-compliant for not meeting the corporate experience requirement and to eliminate it from further consideration.

TRIBUNAL'S ANALYSIS

23. 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 agreement, in this case, the *Agreement on Internal Trade*.[10]

24. The Tribunal notes that the *North American Free Trade Agreement*[11] and the *Agreement on Government Procurement*[12] do not apply to this procurement due to the fact that these services are being procured for DND.[13]

25. Article 506(6) of the *AIT* reads as follows:

> . . . 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.

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9. Clause 2.0 of Annex E to the RFP.
10. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [*AIT*].
11. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].
12. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
13. Annexes 1001.1b-1 and 1001.1b-2 to *NAFTA* exclude the procurement of services relating to Federal Supply Classification (FSC) code 59, under which the systems in question fall, for DND. Appendix 1, Annex 4, note 4 of the *AGP* excludes services relating to goods that are not offered for coverage for DND. FSC code 59 is not offered for coverage for DND.

26. Mircom argued that, when information outside the corporate experience section—notably the experience of its employees—is taken into account, its proposal adequately addresses the RFP's corporate experience requirement. PWGSC, on the other hand, argued that corporate experience is separate from the experience of an entity's personnel and that Mircom did not demonstrate the necessary corporate experience.

27. In taking into account the provisions of the RFP, specifically the note to bidders in the RFP, the Tribunal finds that it is clear that the onus was on Mircom to adequately respond to all the RFP's mandatory requirements and that any omission would lead to the rejection of Mircom's proposal.

28. It is also clear to the Tribunal that the information regarding mandatory requirements, including corporate experience, did not have to be consolidated in one specific section. The wording of clause 2.1 of Annex E to the RFP, relating to mandatory requirements, stated as follows: "Should any of the requirements under this section be omitted from *the proposal*, it will be deemed as non-responsive and will be given no further consideration." [Emphasis added]

29. Mircom alleged that the contracting officer did not properly consider its entire proposal when determining whether it met the mandatory criterion regarding corporate experience. The Tribunal does not agree.

30. The Tribunal notes that, in the GIR, PWGSC made the following uncontested statement: "The evaluation of the mandatory requirement for corporate experience was conducted by the three member technical evaluation team of DND . . . . The technical evaluation team determined that the Complainant's proposal offered no evidence of corporate experience in **repair and overhaul services**".[14] The paragraph goes on to state that the corporate experience cited by Mircom related solely to manufacturing, design and development capabilities.

31. Therefore, the Tribunal considers that Mircom's proposal received a complete examination before the technical evaluation team decided that it did not meet the threshold that would satisfy the corporate experience requirement. It believes that this meant that the evaluation team was simply not convinced that the information provided in respect of the two individuals referred to in the section regarding the experience of the firm's proposed personnel was sufficient to satisfy the requirement for corporate experience.

32. As stated above, the Tribunal considers that the evidence suggests that Mircom's entire proposal was evaluated. It is important to note that, in accordance with the terms of the RFP, the burden is clearly on the bidder to establish how the various elements of its proposal satisfy the applicable requirements of the RFP.

33. In this case, the information provided by Mircom, including that in respect of its personnel, was reasonably determined by the evaluation team to be insufficient to meet the corporate experience required by the RFP. The facts of this case are distinguishable from a previous Tribunal decision.[15] In *MaxSys*, the Tribunal found that PWGSC had violated *NAFTA* by not considering the experience of a company's transferred assets to another, when evaluating what would be sufficient to fulfill the experience requirements of the RFP. In the present case, nothing in the evidence on the record suggests that Mircom, as in the case of *MaxSys*, acquired assets such as "models, theories, templates, processes etc. produced during the [relevant] projects"[16] which might have led to the conclusion that it had acquired the necessary corporate experience.

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14. GIR at 9.
15. *Re Complaint Filed by MaxSys Professionals & Solutions Inc.* (6 May 2002), PR-2001-059 (CITT) [*MaxSys*].
16. *MaxSys* at 12.

34. Therefore, the Tribunal concludes that the RFP clearly identified the requirements of the procurement regarding corporate experience, the criteria to be used in the evaluation of the bids and the consequences of not satisfying the requirement. The Tribunal finds no evidence that PWGSC did not observe the procedures and requirements of the *AIT* when, taking into account DND's technical evaluation results, it disqualified Mircom's proposal for not providing all the necessary information and substantiation regarding its corporate experience in the field of R&O, as required by the RFP. Moreover, the Tribunal finds no evidence that PWGSC breached the *AIT* in disqualifying Mircom's proposal on the basis that it did not meet the mandatory requirement for past corporate experience. Therefore, it concludes that the complaint is not valid.

Costs

35. In accordance with the Tribunal's *Guideline*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

36. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it involved a defined service project on an as-required basis. The complexity of the complaint was low, in that the issue was the assessment of a mandatory pass or fail criterion. Finally, the complexity of the complaint proceedings was low, as there were no interveners, the parties were not required to submit information beyond the normal scope of proceedings, there was no need for a public hearing, and the 90-day time frame was respected. Accordingly, the Tribunal is of the preliminary view that this complaint case has an overall complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). As contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $1,000. The Tribunal reserves jurisdiction to establish the final amount of the award.

DETERMINATION OF THE TRIBUNAL

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

38. 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 Mircom. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is $1,000. 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 by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member