Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-046

Acron Capability Engineering Inc.

v.

Department of Public Works and Government Services

Determination and reasons issued
Tuesday, July 10, 2007

Canada

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IN THE MATTER OF a complaint filed by Acron Capability Engineering 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

ACRON CAPABILITY ENGINEERING 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services allow the current contract to continue, but that it not exercise any options. Should the requirement continue to exist after the initial contract period, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services re-issue a competitive solicitation for the requirement, comprising precise and unambiguous evaluation criteria, in accordance with the provisions of the applicable trade agreements.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Acron Capability Engineering Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings.* The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Serge Fréchette
Serge Fréchette
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On February 26, 2007, Acron Capability Engineering Inc. (Acron) 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 a procurement (Solicitation No. W8475-06BM04/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of technical investigations and engineering services in support of various simulation devices identified under the Canadian Advanced Synthetic Environment (CASE) program.

2. Acron alleged that PWGSC awarded the contract to Greenley & Associates (CAE Professional Services) (Greenley), whose proposal should have been deemed non-compliant, as it did not meet the mandatory requirement of proposing personnel who had participated in a military deployment. Acron also alleged that PWGSC improperly accepted a proposed resource from Greenley who was in a conflict of interest situation and that, because that resource had been given a letter from DND indicating that he was not in a conflict of interest situation, Greenley had been given preferential treatment prior to the release of the solicitation, thereby creating an apprehension of bias.

3. As a remedy, Acron requested that the Tribunal recommend that the contract awarded to Greenley be terminated and awarded to Acron. It also requested that, for any tasks or call-ups that had been initiated, the Tribunal recommend that PWGSC compensate it for its lost profits. In the alternative, it requested that the Tribunal recommend that PWGSC compensate it for its lost profits on the entire project. Acron also requested its costs incurred in preparing and proceeding with the complaint.

4. On March 5, 2007, 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 March 6, 2007, PWGSC informed the Tribunal that a contract had been awarded to Greenley. On April 5, 2007, PWGSC filed the Government Institution Report (GIR). On April 30, 2007, Acron filed its comments on the GIR. On May 11 and 14, 2007, respectively, PWGSC filed confidential and public submissions on Acron's comments on the GIR. On May 18, 2007, Acron filed its response.

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 disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. On October 27, 2006, PWGSC issued a Request for Proposal (RFP). The original bid closing date was December 11, 2006, which was subsequently amended to December 14, 2006. According to PWGSC, it received two proposals: one from Acron and one from Greenley. PWGSC submitted that both proposals were compliant with the mandatory requirements.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

7. For the proposed Joint Task Force Commander, the Exercise Event Coordinator, the Air Component Commander, the Maritime Component Commander and the Land Component Commander, it was a mandatory requirement for the proposed resource to have been involved in military operations, including at least one deployment.[3]

8. On January 29, 2007, PWGSC advised the bidders that the winning proposal was the one submitted by Greenley. According to Acron, on January 30, 2007, it discovered that there were two areas of the winning bid that caused it concern. On February 5, 2007, PWGSC provided a debriefing to Acron with respect to its proposal. Later that day, Acron made an objection to PWGSC regarding its concerns with the winning proposal. On February 12, 2007, PWGSC rejected Acron's objection. On February 26, 2007, Acron filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

9. 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 *Agreement on Internal Trade*.[4]

PWGSC awarded the contract to a non-compliant bidder

10. Article 506(6) of the *AIT* provides the following:

> In 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.

11. Acron alleged that Greenley's proposal included a resource who did not meet the mandatory requirement, which was having participated in a military operational deployment. According to Acron, one of Greenley's proposed resources used a posting to NATO Headquarters in Brussels, Belgium, as evidence of experience in a deployment. Acron contended that Brussels does not appear in the list of Canadian Forces current or past military operational deployments.[5]

12. Acron contended that common military definitions of the term "deployment" are:

> 1. In naval usage, the change from a cruising approach or contact disposition to a disposition for battle.
> 2. The movement of forces within areas of operation.
> 3. The positioning of forces into a formation for battle.
> 4. The relocation of forces to desired areas of operations.[6]

3. RFP, Appendix E to Annex B, Tables 11–15.
4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
5. Complaint, Exhibit 17.
6. Comments on the GIR, para. 11.

13. Acron submitted that the clear emphasis in the definitions of deployment is direct involvement in a combat or battle operation. It argued that the definition does not contemplate the myriad of other staff postings or exercises that are unrelated to an actual deployment; in other words, not all postings abroad are "deployments".

14. PWGSC submitted that the resources proposed by Greenley met the mandatory requirements listed in Tables 11 to 15 and that none of them included a posting to Brussels as experience in order to meet the mandatory requirement of at least one military deployment.

15. After having received the GIR, Acron submitted that, with respect to Greenley's non-compliance with mandatory requirements, the fact that Acron was provided inaccurate information as to the foreign posting of one of the resources proposed by Greenley is immaterial. Acron maintained its allegation and suggested that, in fact, Greenley's proposal included two resources who did not meet a mandatory requirement, which was having participated in a military operational deployment.

16. PWGSC submitted that it does not take issue with the word "deployment" being defined as, for example, "[t]he movement of forces within areas of operation" or "[t]he relocation of forces to desired areas of operations". However, according to PWGSC, the RFP required that certain proposed resources had to have been "involved with military operations, including at least one deployment". PWGSC submitted that the experience criteria, in the context of the procurement, did not require that the proposed resources had to have been deployed in the field. It submitted that the use of the word "involved" was intended to cover all situations in which participation was sufficient for the individual to have familiarity for the purpose of a simulation. PWGSC submitted that Acron contended that "deployment" rather than "involvement with deployment" was the mandatory experience requirement. However, according to PWGSC, all the evaluators applied the more general interpretation of involvement in deployment when evaluating the proposals, including the evaluation of one of Acron's proposed resources who, according to PWGSC, would otherwise have not met the mandatory requirement.

17. Table 12 of Appendix E to Annex B to the RFP reads as follows:

> . . .
>
> Experience (M) Candidates must have demonstrated experience in the following areas:
>
> A. A minimum of two (2) years in the past six (6) years involved with military operations, including at least one deployment, **and** . . .

18. Table 14 of Appendix E to Annex B to the RFP reads as follows:

> . . .
>
> Experience (M) Candidates must have demonstrated experience in the following areas:
>
> C. A minimum of two (2) years in the past six (6) years involved with military maritime operations, including at least one deployment, **and** . . .

19. The Tribunal is of the view that this means that the candidate's involvement in military operations must include at least one deployment. This requirement goes beyond the planning stage, to actual participation in the act. This is based on the plain meaning of the words used, as well as the grammatical construction in the drafting of the sentence of the mandatory requirement. The first part of the sentence describes the mandatory requirement in general terms. It requires a minimum of two years, in the past six years, of involvement in military or maritime operations, as the case may be. However, that part of the sentence is followed by a comma and a second part which reads: "including at least one deployment". In the Tribunal's opinion, this particular sentence construction indicates clearly that, in addition to the general requirement regarding the involvement in military or maritime operations, there must also be a demonstration that the individual concerned has also participated in one deployment. The particular sentence construction selected by the drafters makes no sense otherwise. Had they intended to limit the

requirement to simply having been involved in the general sense, as suggested by PWGSC, they would not have added the second part of the sentence.

20. The Tribunal notes that there is no definition or further explanation for the phrase "involved with military operations, including at least one deployment" that was used in Table 12 of Appendix E to Annex B to the RFP or for the similar wording used in Table 14.

21. In its comments on the GIR, Acron submitted definitions of the term "deployment" from an on-line military dictionary entitled "MilTerms".[7] The Tribunal notes that PWGSC did not contest those definitions. Of particular note in those definitions is the following phrase: "Deployment encompasses all activities from origin or home station through destination, specifically including intra-continental United States, inter-theater, and intratheater movement legs, staging, and holding areas."[8] The definition also makes a distinction between "deployment" and "deployment planning".

22. In the Tribunal's view, if PWGSC and DND had intended that "including at least one deployment" simply meant involvement in a deployment, then the requirement should have been clearly worded in that manner. The Tribunal was influenced in its decision by the fact that the evaluation criteria at issue were mandatory requirements and, as such, should be defined precisely and interpreted narrowly. Consequently, the Tribunal finds that PWGSC did not apply the selection criteria in accordance with the requirement specified in the RFP and, as a result, has not conducted the procurement in accordance with Article 506(6) of the *AIT*. Accordingly, the Tribunal finds that this ground of complaint is valid.

Conflict of Interest/Apprehension of Bias

23. Acron alleges that Greenley included an individual in its proposal who is in a conflict of interest situation because of his prior involvement in a modelling and simulation company whose employees work at a facility to which the CASE program office provides simulators, funding and resources.

24. Acron submitted that the individual in question was given a letter from DND indicating that there was no conflict of interest situation and indicating that the individual in question could be submitted as a resource. Acron further submitted that it was not aware that such a letter existed and, as such, would have immediately raised the issue with PWGSC and DND. Acron contended that this situation creates an apprehension of bias in favour of Greenley, as it was given preferential treatment prior to the release of the solicitation document and without the knowledge of all the bidders.

25. PWGSC submitted that past involvement in a CASE program activity does not create a conflict of interest for the current procurement, particularly in view of the fact that military simulation is a highly specialized and developing area with a limited number of industry players in Canada. PWGSC also submitted that an incumbent contractor is not precluded from bidding on a recurring requirement by reason of having been awarded the previous contract. It further submitted that no bidder or bidder resource was involved, in any way, in the development of the RFP, that no bidder acquired RFP information that was different from that of another bidder and that no bidder was involved in an improper relationship.

26. PWGSC submitted that there is no specific allegation or evidence that the individual's role at the specific facility provided Greenley with an unfair advantage over the other bidders or that Greenley had additional information that assisted it in its bid by virtue of this role. PWGSC further submitted that no one at the specific facility was involved, in any way, in the development of the requirement at issue. Regarding the letter that was allegedly given to the individual in question, PWGSC submitted that it and DND are not aware of its existence.

7. *Ibid*., Tab 1.
8. *Ibid*.

27. In *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*,[9] the Federal Court of Appeal found that, under the *AIT*, the Tribunal's jurisdiction in respect of actual bias also included the consideration of allegations of reasonable apprehension of bias. The test applied by the Tribunal in order to determine if the circumstances of this case give rise to a reasonable apprehension of bias is the one set out by de Grandpré, J. in his dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*, as affirmed by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*,[10] which reads as follows:

> [W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude[?] Would he think that it is more likely than not that [the individual], whether consciously or unconsciously, would not decide fairly[?][11]

28. The Tribunal is not convinced, based on the evidence before it, that the individual's prior involvement in a modelling and simulation company, or his prior involvement in DND projects, had any influence on the drafting of the RFP or biased the evaluators in favour of Greenley. As such, in the Tribunal's view, Acron failed to provide evidence that would lead to a conclusion that there is an indication of a conflict of interest or of a reasonable apprehension of bias. Therefore, the Tribunal finds that this ground of complaint is not valid.

REMEDY

29. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

> . . .
>
> (*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;
>
> (*b*) the degree to which the complainant and all other interested parties were prejudiced;
>
> (*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
>
> (*d*) whether the parties acted in good faith; and
>
> (*e*) the extent to which the contract was performed.

30. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations. The major factor applicable to this case is that a contract has already been awarded and, presumably, work has commenced.

31. The Tribunal notes that, while not acting in bad faith, PWGSC incorrectly applied the evaluation criteria to both Greenley's and Acron's bids and that, if the correct approach had been taken with respect to the term "deployment", both bids would have been deemed to have been non-compliant. The Tribunal further notes that Acron was not the lowest bidder. Therefore, the Tribunal cannot recommend that the contract be awarded to Acron.

32. Accordingly, the Tribunal recommends that PWGSC allow the current contract to continue, but that it not exercise any options. Should the requirement continue to exist after the initial contract period, the Tribunal recommends that PWGSC re-issue a competitive solicitation for the requirement, comprising precise and unambiguous evaluation criteria, in accordance with the provisions of the applicable trade agreements.

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9. (28 November 2000), A-421-99 (F.C.A.).
10. 2003 SCC 36.
11. [1978] 1 S.C.R. 369 at 394.

Costs

33. The Tribunal awards Acron its reasonable costs incurred in preparing and proceeding with 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 complex, as it involved the provision of multiple technical resources in support of various synthetic environment project activities for DND. The complaint was of medium complexity, as it dealt with matters concerning the evaluation of bids and conflict of interest issues. The complaint proceedings were also of medium complexity, as there were additional submissions from both parties. 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

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

35. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC allow the current contract to continue, but that it not exercise any options. Should the requirement continue to exist after the initial contract period, the Tribunal recommends that PWGSC re-issue a competitive solicitation for the requirement, comprising precise and unambiguous evaluation criteria, in accordance with the provisions of the applicable trade agreements.

36. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Acron its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

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