



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2006-049

BDMK Consultants Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Monday, June 11, 2007*

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IN THE MATTER OF a complaint filed by BDMK Consultants 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**

**BDMK CONSULTANTS 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 section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards BDMK Consultants 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 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.

Ellen Fry  
Ellen Fry  
Presiding Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

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## STATEMENT OF REASONS

### COMPLAINT

1. On March 13, 2007, BDMK Consultants Inc. (BDMK) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned the procurement by the Department of Public Works and Government Services (PWGSC) (Solicitation No. W8484-060001/A), on behalf of the Department of National Defence (DND), for the provision of computer help desk support services.

2. BDMK alleged that PWGSC improperly evaluated rated requirement R3 of its proposal and that bidders were not made aware of the financial evaluation methodology used in determining the winning proposal. As a remedy, BDMK requested that its proposal be re-evaluated, that its proposed resource be awarded an additional 10 points for having greater experience than required and that its proposal be fairly rated against other bidders.

3. On March 22, 2007, the Tribunal informed the parties that it had decided to conduct an inquiry into the first ground of complaint, i.e. that rated requirement R3 of BDMK's proposal was improperly evaluated, as the complaint met the requirements of subsection 30.13(1) 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> On April 16, 2007, PWGSC filed the Government Institution Report (GIR). On May 2, 2007, BDMK advised the Tribunal that it was satisfied with PWGSC's response and that it was not going to file any 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 procurement at issue is for the provision of computer help desk support services to DND personnel for its Records, Document and Information Management System and other commercial off-the-shelf (COTS) software products.

6. The Request for Proposal (RFP) was made available through MERX<sup>3</sup> on January 5, 2007, with a due date for the receipt of bids of February 14, 2007. Related to this complaint, Annex D of the RFP, entitled "Evaluation Procedures and Criteria", contained the following sections:

#### D.1 Evaluation Procedures

##### Selection Method

To be considered compliant, a proposal must:

- (a) meet all the mandatory requirements of this RFP; and
- (b) achieve the required minimum overall score of 75 percent of the points for the Bidder criteria which are subject to point rating specified in this RFP, and

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. Canada's electronic tendering service.

Proposals not meeting (a) or (b) above will be given no further consideration. The Bidder with the lowest cost per point responsive proposal will be recommended for Contract award.

## D.2 Evaluation Criteria

...

### Rated Requirements

No.	Bidder Rated (R) Requirements	Cross Reference
...	...	...
R3	Experience in supporting with any of the following COTS applications; MS Access, MS Project, MS Powerpoint, MS Excel, MS Outlook, Visio, Adobe Acrobat. 2.5 points for each year of experience to a maximum of 10 points.	
...	...	...

7. On February 21, 2007, PWGSC informed BDMK that a contract had been awarded to Cistel Technology Inc. and that evaluators had determined that BDMK's proposal did not attain the mandatory 75 percent necessary for further consideration. On February 26, 2007, BDMK telephoned PWGSC to object to the rejection of its proposal. On March 1, 2007, PWGSC provided a debriefing to BDMK. On March 7, 2007, BDMK wrote to PWGSC, requesting confirmation of the reasons for which its proposal was deemed non-compliant. PWGSC responded on the same day, confirming the original evaluation.

8. On March 13, 2007, BDMK 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. Moreover, 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*,<sup>4</sup> the *North American Free Trade Agreement*<sup>5</sup> and the *Agreement on Government Procurement*.<sup>6</sup>

10. BDMK alleged that, regarding rated requirement R3, its proposal stated that its resource had "... 10+ years of experience in support of MS Access, MS Project, MS Powerpoint, MS Excel, MS Outlook, Visio, Adobe Acrobat applications. ..." However, according to PWGSC, the résumé that BDMK had attached to demonstrate the experience did not support this claim. According to BDMK, PWGSC informed it that the reference in the résumé to the complete software suite, i.e. "Microsoft Office", could not be construed as supporting any of the specifically listed applications.

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

5. *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].

6. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [AGP].

11. BDMK acknowledged that the résumé stated that its resource had the requisite experience in “Microsoft Office”, but that “Microsoft Office” is widely known as the suite of software that includes MS Word, Excel, PowerPoint, Access and Outlook. It submitted that its resource should therefore have been awarded full marks (10 points) regarding rated requirement R3. BDMK further submitted that, had it been awarded these 10 points, its proposal would have been compliant and that it would have offered the lowest cost per point.

12. In its GIR, PWGSC submitted that it had initiated a review of the procurement process and had concluded that BDMK’s proposal was, in fact, responsive to rated requirement R3 and that it should have received the full 10 points. PWGSC acknowledged that, under these circumstances, BDMK’s proposal would have been considered compliant, as it would have attained the necessary 75 percent of the available marks in the “Evaluation Criteria” section.

13. PWGSC submitted that, notwithstanding this fact, BDMK would not have been awarded the contract, as its proposal would not have represented the lowest cost per point. It submitted that BDMK’s cost per point would have been significantly higher than the calculated cost per point for the successful bidder. PWGSC further submitted that BDMK is therefore not entitled to any compensation; however, PWGSC submitted that BDMK is entitled to its reasonable costs incurred in preparing and proceeding with the complaint.

14. On May 2, 2007, BDMK advised the Tribunal that it was satisfied with PWGSC’s submission and that it was not going to provide any additional comments.

15. The Tribunal finds that PWGSC, in conducting the evaluation, failed to take into account all the information provided in BDMK’s proposal, which included the proposed resource’s résumé. As a result, PWGSC failed to award BDMK points that it should have received regarding its proposed resource’s experience for rated requirement R3. The Tribunal considers that PWGSC should have interpreted experience in “MS Office” as encompassing experience in one or more of the required software packages (i.e. MS Access, MS Project, MS PowerPoint, MS Excel, MS Outlook) given that it is general knowledge that such software is included in MS Office. The Tribunal notes that, in its GIR, PWGSC acknowledged this mistake and agreed that BDMK should have been awarded full marks for this requirement.

## Remedy

16. Having found the complaint to be valid, the Tribunal must now recommend a suitable means of redressing the harm that the deficiencies in the evaluation process caused to BDMK.

17. In this connection, the Tribunal is governed by subsection 30.15(3) of the *CITT Act*, which reads as follows:

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (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.

18. The Tribunal considers that there is a serious deficiency in the procurement process when suppliers' proposals are not evaluated in accordance with the terms outlined in the RFP. However, in this case, the rating information provided by PWGSC demonstrated that, even if BDMK had been awarded full marks for rated requirement R3, the contractor selection method described in the RFP would still have resulted in the contract being awarded to the same company. In addition, there was no evidence to suggest that PWGSC was not acting in good faith when it conducted the evaluation.

19. Because BDMK has not, in the Tribunal's view, suffered prejudice as a result of PWGSC's actions, the Tribunal will not recommend a remedy in this case.

20. The Tribunal awards BDMK its reasonable costs incurred in preparing and proceeding with the complaint, noting that PWGSC acknowledges that BDMK should receive such costs. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). 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 low, in that it involved routine services provided by a single party. The complexity of the complaint was low, in that it involved a single technical matter relating to the evaluation of one criterion of the proposals. Finally, the complexity of the complaint proceedings was low, as PWGSC agreed that the complaint was valid.<sup>7</sup> Also, there were no interveners, no motions and no public hearing, and the 90-day time frame was respected. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

## DETERMINATION OF THE TRIBUNAL

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

22. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards BDMK 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 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.

Ellen Fry  
Ellen Fry  
Presiding Member

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7. The GIR was a 3-page letter in which PWGSC admitted that it should have awarded BDMK 10 additional points but that the contract awardee would not have changed. BDMK did not file any comments on the GIR.