



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-069

Chamber of Shipping of British
Columbia

v.

Department of Fisheries and
Oceans

*Determination and reasons issued
Wednesday, March 24, 2010*

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IN THE MATTER OF a complaint filed by the Chamber of Shipping of British Columbia pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

THE CHAMBER OF SHIPPING OF BRITISH COLUMBIA

Complainant

AND

THE DEPARTMENT OF FISHERIES AND OCEANS

**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.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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Complainant: Chamber of Shipping of British Columbia

Counsel for the Complainant: H. Peter Swanson

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STATEMENT OF REASONS

1. On December 24, 2009, the Chamber of Shipping of British Columbia (COS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a procurement (Request for Proposal [RFP] No. FP802-090083) issued by the Department of Fisheries and Oceans (DFO) for the management of the billing and collection of the Canadian Coast Guard's (CCG) Marine Navigation Services Fee (MNSF) in the Western Region of Canada.

2. COS submitted that DFO improperly ignored vital information found in its bid, wrongly interpreted the scope of bid requirements, based its evaluation on undisclosed or irrelevant criteria and failed to conduct the evaluation in a procedurally fair way. As a remedy, COS requested that it be awarded the contract or, in the alternative, that the bids be re-evaluated. It also requested that it be compensated for the costs that it incurred in preparing its proposal and bringing the complaint before the Tribunal and that the Tribunal order DFO to postpone the award of any contract until the Tribunal determined the validity of the complaint.²

3. On January 7, 2010, the Tribunal informed DFO and COS that the complaint had been accepted for inquiry, since 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*.³ On January 29, 2010, DFO submitted the Government Institution Report (GIR). On February 15, 2010, COS filed 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 an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

5. On July 17, 2009, DFO made available, through MERX,⁴ an RFP for the management of the billing and collection of the MNSF. The due date for the receipt of bids was September 2, 2009, and, according to DFO, three bids were submitted. The RFP advised bidders that their bids had to meet all mandatory criteria (i.e. criteria M1 through M4) and obtain a minimum overall score of 70 out of 105 points on the five rated criteria (i.e. criteria R1 through R5). The RFP further specified that proposals failing to meet these requirements would be deemed non-responsive and disqualified from further consideration. Those proposals that met these requirements would have their financial components evaluated, with the lowest-priced bid being awarded 10 points and any remaining bids being scored on a pro-rated basis. The RFP advised that the winning bidder was to be selected on the basis of the assessed best value to DFO, which was to be determined on the basis of total points, including the points awarded for price.

6. In a letter dated November 26, 2009, DFO advised COS that Thunder Bay Airport Services Inc. (TBASI) had been selected as the successful bidder and that, while COS's proposal had demonstrated a good overall understanding of the requirement, the bid had not adequately addressed all aspects of paragraph d. of rated criterion R3 and paragraph b. of rated criterion R4 of the RFP.

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

2. According to documents filed with the complaint, the contract had already been awarded when COS filed its complaint. The Tribunal, therefore, did not issue the requested order.

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

4. Canada's electronic tendering service.

7. On December 8, 2009, DFO conducted a debriefing meeting with representatives of COS.

8. In a letter sent to DFO on December 9, 2009, COS made an objection regarding the procurement and addressed DFO's letter of November 26, 2009, and certain comments that COS claimed had been made by DFO staff at the debriefing meeting. Specifically, COS highlighted areas in its proposal where information could be found which, it claimed, addressed DFO's concerns regarding rated criteria R3 and R4. In addition, COS asserted that one of the evaluators had stated that the reference letters included in COS's proposal had not been considered, that none of TBASI's references had been checked and that the past performance of the bidders was irrelevant and had not formed part of the evaluation process. COS submitted that this statement was at odds with the evaluation criteria of the RFP and that, if the evaluator's comments were correct, the evaluation process was flawed and the bids should therefore be re-assessed.

9. Between December 9 and 14, 2009, DFO provided COS with a copy of its evaluation scores.

10. On December 14, 2009, DFO responded by advising COS that DFO had followed all relevant procedures and policies in the evaluation of COS's bid. The letter also stated: "[W]e have reviewed your comments regarding [the DFO staff's] purported statements and your request for a reassessment of the proposal from [COS]. [DFO] is not persuaded that your . . . objection would result in a different decision and therefore . . . decline[s] your request for a reassessment."

11. On December 24, 2009, COS filed its complaint with the Tribunal.

PRELIMINARY MATTER

COS's Request for the Production of TBASI's Bid Evaluation Results

12. On February 22, 2010, COS requested that the Tribunal require, by order, that the bid submitted by TBASI and the evaluation of this bid by DFO be produced. On February 24, 2010, DFO objected to this request and submitted that all the relevant information and supporting documentation were provided to the Tribunal with its GIR on January 29, 2010. DFO added that COS's proposal was not rated against the proposal submitted by the successful bidder, but rather against the selection criteria which formed part of the RFP. On February 25, 2010, COS responded to DFO's objection and submitted that a full and fair determination of the complaint was not possible without the requested information. In this regard, it argued that it would not be possible for the Tribunal to assess whether the evaluators had applied the evaluation criteria in a consistent manner without the requested information before it. It further contended that it would not be possible to determine whether DFO conducted the evaluation in a procedurally fair way without having access to the material submitted on behalf of TBASI and that a review of this material could reveal other grounds of complaint.

13. After having considered the representations made by the parties, the Tribunal informed them, on March 3, 2010, of its decision to deny COS's request. In the Tribunal's view, the production of the requested material was not warranted for the following reasons.

14. First, the allegations contained in the complaint, which frame this inquiry, essentially relate to DFO's point scoring of the proposal submitted by COS. In this regard, the Tribunal accepts DFO's argument that COS's proposal was not rated against that of the successful bidder, but rather against the specific evaluation criteria set out in the RFP. Accordingly, the Tribunal is of the view that the proposal submitted by the successful bidder and the results of DFO's evaluation of that proposal are neither relevant to, nor necessary for, the assessment of these allegations.

15. Second, while the complaint includes a general reference to an alleged failure by DFO to conduct the evaluation in a procedurally fair way, the Tribunal notes that this allegation was not substantiated by information or evidence that would give rise to a reasonable indication of the existence of circumstances creating a reasonable apprehension of bias, or of a potential breach of the rules of procedural fairness in DFO's evaluation of competing proposals. In the absence of such information or evidence, the Tribunal considers that it would be inappropriate to order DFO to produce the requested material. In this regard, the Tribunal has stated in the past that it will not allow complainants to have access to documents when the sole objective is to find evidence to use in a complaint.⁵ Moreover, there is an onus on a complainant to provide evidence of the basic facts underpinning an allegation. In the Tribunal's view, the inclusion of a general allegation in a complaint, which is not supported by information or evidence sufficient to give rise to a reasonable indication of its veracity, does not provide a basis for the complainant to access documents in the possession of the government institution in order to validate that unsubstantiated and speculative allegation.

16. Finally, with respect to the argument that, without the requested material, it would not be possible to determine whether "[t]here may, in fact, be other grounds [counsel] should be advancing on behalf of [COS]",⁶ the Tribunal notes that the grounds of complaint cannot simply be changed or supplemented after a complaint is accepted for inquiry. Indeed, the raising of new grounds would constitute a substantive amendment to the complaint in circumvention of section 7 of the *Regulations*, which directs the Tribunal to consider whether certain conditions are met before accepting to inquire into a particular ground of complaint. For this reason, while it may be possible for a complainant to file, subject to the time limits set out in section 6, a second complaint where new grounds are discovered, it would not be open to the Tribunal, at this stage of the process, to allow COS to amend the current complaint to include additional grounds.

17. In view of the above considerations, the Tribunal informed COS, by letter dated March 3, 2010, that its request for the production of the material in question was denied.

TRIBUNAL'S ANALYSIS

18. 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. At the conclusion of the inquiry, the Tribunal must determine the validity of the complaint 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 case, is the *Agreement on Internal Trade*.⁷

19. Article 506(6) of the *AIT* provides that "[t]he 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."

20. The Tribunal notes that the evaluation criteria are set out in Appendix "D", "EVALUATION CRITERIA", to the RFP. Appendix "D" is comprised of two sections: (i) "Mandatory Requirements" (set out in Table 1) and (ii) "Rated Criteria" (set out in Table 2). The bid evaluation process required that the Technical Evaluation Committee ensure that all proposals met the mandatory requirements in order to be

5. *Re Complaint Filed by EDS Canada Ltd.* (30 July 2003), PR-2002-069 (CITT) at 10.

6. Letter filed by counsel for COS in response to DFO's comments regarding the request for production of document, February 25, 2010, at 2.

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

considered compliant and to qualify for the next phase of the technical evaluation process, i.e. the evaluation of proposals on the basis of the rated criteria. In this regard, Appendix “D”, which contains the evaluation criteria, provides as follows:

Proposals must comply with all the mandatory requirements identified in Section 6 of the Appendix “C” Statement of Work. These mandatory requirements also appear in Table 1. Non-compliance with any of the mandatory requirements will render the Proposal non-responsive and it shall be disqualified and receive no further consideration. Proposals which comply with all of the mandatory requirements will be evaluated on their technical proposal as set out below.

Proposals will be evaluated against the rated criteria

21. Appendix “D” provides as follows with respect to the rated requirements of the technical proposal:

The purpose of the technical proposal is to demonstrate the qualifications, competence and capacity of the applicants seeking to undertake the provision of the services requested in this Request for Proposals. Prospective Contractors should respond to all requests for information concerning their expertise and experience as described. It is in the prospective Contractor’s best interest to respond fully to these criteria as it is the criteria on which technical points will be scored.

22. The specific rated criteria to which DFO referred in its November 26, 2009, letter, in respect of which COS’s bid was found to be deficient, read as follows:

Section R3: Approach and Methodology

- d. In their proposal, Bidder should describe their proposed method to safeguard personal information and commercially sensitive data as set out in Section 3.4.4 . . . of the Statement of Work [SOW].

Section R4: Client Focus

- b. In their proposal, bidder should identify: the key elements of a plan; the human resources; and the communications and system capacity to respond in a timely manner to inquiries, concerns and disputes raised by fee-paying clients and their representatives as set out in Section 3.8 (inclusive) of the [SOW].

23. The sections of the SOW referred to in those rated criteria, in turn, read as follows:

3.4.4 Ownership and Use of MNSF Billing Data for Other Purposes

The Government of Canada is the sole owner of the VTOSS/INNAV [Vessel Traffic Operational Support System/Information System on Marine Navigation] and billing and collection data, but the Contractor may use the VTOSS/INNAV and billing and collection data to perform analysis related to the billing and collection function. Similarly, fee-paying clients can receive their own billing information. However, the disclosure to any party outside of the billing and collection unit of the Contractor’s organization, of any VTOSS/INNAV or MNSF billing and collection information that is unrelated to billing and collection functions identified in this [SOW] requires the prior written consent of CCG/DFO. The Contractor will consider this information commercially sensitive and will treat it consistently in a confidential manner. In the event of unapproved release of this information, the Government of Canada retains the option to terminate the contract.

3.8 Client Relations

The Contractor will submit a discussion and/or meeting agenda on items of i) mutual interest as well as ii) issues of concern to fee-paying clients or the Contractor, for the review and comment of representatives of Western Region fee-paying clients, at minimum, every four months, and invite these representatives to discuss the items on this agenda. The Contractor will submit the agenda and

a meeting request to recognized Western Region marine industry organizations that represent fee-paying clients, including domestic and international cargo shipping, ferries and cruise ships. These discussions may take place by teleconference, however, the Contractor must offer to travel to a location in the Western Region to meet these representatives, at minimum, once every 12 months. At the conclusion of every meeting for which an agenda was prepared, the Contractor will prepare a summary of the main points of discussion for the review and comment of all meeting participants, and submit a final copy to CCG Maritime Services Directorate.

3.8.1 Client Service Standards

The Contractor will develop client service standards that propose client response procedures and response times across six service areas:

- General Telephone Enquiries
- Written General Enquiries
- Statements of Accounts
- Delivery of Invoices
- Processing of Adjustments
- Problem Resolution

The Contractor will communicate the service standards in writing to DFO and to fee-paying clients within 60 days of the start of the contract. Amendments to the service standards will also be communicated in writing to DFO and to fee-paying clients in a timely fashion.

Annex B of this [SOW] contains general examples and guidelines for service standards ascribed to each service area. The Contractor will propose specific service standards, as appropriate, according to its own business practices. At minimum, the Contractor must meet the requirements of the contract.

3.8.2 Client Communications

The Contractor will communicate to fee-paying clients by written notification that it has assumed responsibility for the billing and collection of MNSF in the Western Region on behalf of CCG. The Contractor will send this written notification to each fee-paying client no later than the delivery date of the first billing invoice.

Within 60 days of the start of the contract, the Contractor will post the following information on its website:

- A general description of the duties the Contractor is undertaking on behalf of CCG;
- Information relating to the PNS discount as set out in Section 3.3.4;
- Contractor contact information;
- Client Service Standards as set out in Section 3.8.1; and
- A link to the CCG Marine Services Fees website.

24. With respect to its allegations regarding the evaluation of past performance, COS referred to the following sections of the RFP:

Section M1: Experience and References

...

References: To be eligible for consideration, the Contractor **must** provide a list of references, i.e., current and/or past clients who can attest to the Contractor's experience and qualifications as it relates to the [SOW] described. The information **must** include the name of the client, a contact name and title, as well as the address and phone number.

...

Section R2: Capability to Carry Out Work

a. In their proposal, bidder should demonstrate their experience, and performance in providing billing and collection services.

*Preference will be given to applicants with experience related to projects of a similar size and scope.

b. In their proposal, bidders should demonstrate the ability of their billing and collection systems to be used to carry out the work of this requirement.

*Preference will be given to applicants with experience related to projects of a similar size and scope. Past sample billing and collection reports or invoices will assist in the evaluation of this rated criterion.

c. In their proposal, bidder should provide a description of past projects demonstrating the ability of proposed personnel to carry out the billing and collection tasks.

d. In their proposal, bidder should demonstrate the adaptability and technical capability to deliver the services and requirements outlined in the [SOW], according to the identified timelines, from inception of the contract to its end date.

DFO's Position

25. In DFO's November 26, 2009, letter,⁸ it advised COS as follows:

Overall, your proposal demonstrated a good understanding of the requirement however, under section R3 (d) *safeguarding information as set out in sections 3.4.4:*

No acknowledgement of the requirements of section 3.4.4 *Ownership and Use of MNSF Billing Data for Other purposes* indicates basic understanding of the requirement. There was no reference or acknowledgement of the sensitivity of the VTOSS/INNAV or billing and collection data and the requirements relating to them as set out in section 3.4.4. These requirements are an important DFO-CCG requirement as they indicate an acknowledgement, willingness and capacity to safeguard CCG-assembled information, and commercially sensitive information – the intentional or inadvertent release of which could be harmful to commercial interests of fee paying stakeholders.

Also, under section R4 (b), your proposal does not identify all required elements set out in 3.8 *Client Relations*.

26. DFO submitted that Appendix "D" to the RFP, which contained the evaluation criteria, advised bidders that their proposals should respond to all requests for information concerning their expertise and experience as described and that it was in the prospective contractor's best interest to respond fully to these criteria.

27. Regarding references, DFO submitted that references were required as part of mandatory criterion M1 and did not form part of the rated criteria evaluation. It submitted that the purpose of this criterion was to verify that the bidder had actual experience in the field of billing and fee collection and was not intended to seek qualitative comments on the level of service provided by the respective bidders. It also noted that the RFP did not indicate that the evaluators would contact the references.

8. Complaint, tab 7.

28. DFO submitted that the evaluator's statement that past performance was irrelevant and had not been considered was taken out of context.⁹ DFO submitted that, in relation to paragraphs a. and b. of rated criterion R2, which it claimed were the factors that dealt with the past performance, the past and present performance of COS *had* been taken into account, resulting in COS's bid having been awarded almost full marks for these two criteria.

29. With respect to its evaluation of COS's response to paragraph d. of rated criterion R3, DFO submitted that the paragraph required bidders to describe their proposed method of safeguarding personal information and commercially sensitive data, as set out in sections 3.4.4 and 3.4.5 of the SOW. DFO acknowledged that COS's bid did include a section on the protection of personal information, but claimed that it had not contained any references, description or acknowledgement of the sensitivity of the combination of VTOSS/INNAV data and MNSF billing and collection data. It also submitted that COS's proposal was lacking any description of how the commercially sensitive data would be safeguarded.

30. With respect to its evaluation of COS's response to paragraph b. of rated criterion R4, DFO submitted that bidders' proposals were required to identify the key elements of a plan, including human resources, communications and system capacity to respond to inquiries by the fee-paying clients, as set out in section 3.8 of the SOW. DFO submitted that the evaluators had taken into account only that information found in COS's bid, including the information that COS asserted DFO had not properly evaluated. DFO submitted that the evaluators had found that COS's proposal had not addressed all necessary aspects of section 3.8 of the SOW, which led to it being awarded only partial marks.

31. With respect to COS's allegations regarding DFO's overall evaluation of COS's responses to the rated criteria of the RFP, DFO submitted that each of its point deductions for the rated criteria were made after consideration of the overall contents of COS's proposal.

Position of COS

32. COS submitted that the RFP required bidders to provide a description of the firm's capability to carry out the work and that its bid had properly provided an indication of previous projects of a similar nature that the firm had successfully completed. It claimed that, at the debriefing meeting, one of the evaluators advised COS that past performance had not been considered and was irrelevant to the process. COS submitted that the past performance of bidders was both relevant and important to the bid and evaluation process. In this regard, it submitted that the RFP clearly contemplated that references would be contacted and that the information given would be used in the evaluation process.

33. COS argued that DFO's submission that the seeking of references was not intended to seek qualitative comments, ran counter to the wording of the requirement. It submitted that mandatory criterion M1 required that contact coordinates (name, address, phone number, etc.) be provided for references and that they be "... current and/or past clients who can attest to the Contractor's experience ... as it relates to the [SOW] described." COS submitted that the RFP therefore intended for DFO to contact the references and to have an objective third-party mechanism to aid in the assessments of the bids.

34. COS submitted that it had specified in its bid that it had been instrumental in working with the CCG in establishing the MNSF in the Western Region and that it had been the primary service provider for the billing and collection of the fee from 1996 to November 2005, when TBASI won the contract. COS claimed

9. COS claimed that it did not recall any such limitation on the statement and challenged this assertion in its comments on the GIR.

that, based on what the evaluator said at the debriefing meeting, this information, as well as the reference letters from service recipients included in COS's bid, was considered irrelevant and was not taken into account with respect to both COS's and TBASI's performance of the services in question.

35. COS submitted that the scoring of its responses to the rated criteria indicated that points were deducted based on irrelevant factors or a failure to understand the bid as submitted. COS asserted that its proposal had deliberately avoided repeating explicit requirements in the SOW. It claimed that it was guided in part by leading statements in the RFP that invited comments (i.e. "The Contractor will propose"), rather than the instructions outlined in the SOW. It noted that many of the deductions resulted from COS not expressly restating the contractual requirements for certain work, notwithstanding that it did acknowledge, in its bid, the contract documents (including the SOW) and the need to perform the work in accordance with those documents. It argued that DFO's point deductions, in such a context, were neither appropriate nor fair.

36. Regarding specific criteria for which it had been deducted points, COS maintained:

- that both sections 3.3.4. and 3.8 of the SOW were statements of policy, which should have been judged as having been accepted by COS by virtue of the fact that it did not contest them in its bid;
- that the deduction of points under paragraph b. of rated criterion R2 for the failure to provide samples of invoices or collection reports was unwarranted, as the RFP did not *require* such samples and because this element was, in any event, addressed in its bid;
- that, with respect to section 3.3.4 of the SOW ("Ownership and Use of MNSF Billing Data for Other Purposes"), its bid had addressed the issue of document security in very clear terms, with its document security and protection procedures included in its bid;
- that, because the VTOSS/INNAV data referred to in section 3.3.4 of the SOW are freely available and already used by COS and others on a regular basis, it was a completely irrelevant factor that should neither have been considered nor resulted in any deduction of points; and
- that there was no reason for it to have lost any points for simply having failed to restate the requirements of section 3.8 of the SOW ("Client Relations").¹⁰

Tribunal's Examination of the Allegations

37. Before turning to an examination of COS's specific allegations, the Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluation of bid proposals. In *Northern Lights Aerobic Team, Inc.*,¹¹ the Tribunal indicated that it "...will interfere only with an evaluation that is unreasonable" and would substitute its judgment for that of the evaluators "...only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way." [emphasis added].

38. It is in light of these principles that the Tribunal will assess whether the evaluation of COS's proposal complied with the requirements of the *AIT*.

10. In this regard, COS noted that its proposal set out, in detail, the approach and methodology that it intended to use, with nothing in them being inconsistent with the stated requirements of section 3.8 of the SOW. Finally, COS claimed that the evaluators could have sought clarification with respect to those aspects of its proposal which were misunderstood.

11. *Re Complaint Filed by Northern Lights Aerobic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

Alleged Failure to Consider Past Performance

39. The Tribunal notes that COS ascribed considerable importance to statements attributed to a DFO official that “. . . past performance was not to be taken into account during the evaluation process” and that “. . . it was considered irrelevant to the RFP process”,¹² as, under the terms of the RFP, past performance was clearly a relevant consideration.

40. That being said, a review of the evaluation team’s evaluation spreadsheet¹³ does not indicate any reason for the Tribunal to interfere. In this regard, the Tribunal notes that, under paragraph a. of rated criterion R2 (“Capability to Carry Out Work”), COS’s proposal received full marks for experience and past performance.

41. With respect to paragraph b. of rated criterion R2, the Tribunal finds nothing unreasonable in the deduction of points for the failure to provide samples of past invoices and collection reports, as the RFP specifically advised that they would be of assistance in the evaluation under this criterion.¹⁴ Nor does the Tribunal find that there is any basis to consider unreasonable the point deduction under paragraph c. of the same criterion for the adjudged failure of the résumé of one of COS’s five proposed staff members, who would have been dedicated to MNSF administration under the contract, to meet the identified requirements of her potential role in carrying out billing and collection functions.¹⁵

Alleged Failure to Consider Reference Letters

42. COS also ascribed considerable importance to a statement that it attributed to a DFO official, specifically that reference letters from service recipients attached to its bid proposal had been ignored.¹⁶ Indeed, section M1 of the mandatory requirements enumerated in Table 1 of Appendix “D” to the RFP clearly points to the relevancy of such references.

43. However, a review of the evaluation spreadsheet indicates that COS was indeed credited with having met this mandatory criterion. In this regard, the Tribunal agrees with DFO that, while part of the mandatory criteria, references were not among the rated considerations enumerated in the solicitation. The Tribunal notes that, according to DFO,¹⁷ the COS’s past experience was taken into account with respect to paragraphs a. and b. of rated criterion R2, resulting in it being awarded 28 out of a possible 30 points for these two paragraphs of rated criterion R2.

44. The Tribunal notes that, in its complaint and comments on the GIR, COS challenged the abilities of TBASI to perform the required services. In this regard, COS attached to its proposal “. . . letters of support from 12 Chamber members”, a review of which, according to COS, “makes it more than abundantly clear that the Chamber was the preferred service provider.”¹⁸ This, COS argued, raised an obvious concern over

12. Complaint, tab A, para. 13.

13. Complaint, tab 10.

14. According to page 22 of the GIR, COS failed to append sample invoices or collection reports to its proposal.

15. According to page 41 of the GIR, COS’s proposal contained the following one-sentence description regarding the billing and collection tasks: “The intention is to assign [the resource] to the billing and collection responsibilities pertaining to the domestic MNSF.” DFO submitted that the description of the past projects undertaken by that named resource, and that resource’s résumé, did not fully meet the requirements of that resource’s future potential role.

16. Complaint, tab A, para. 23.

17. GIR at 21.

18. Complaint, tab A, para. 29.

the evaluator's failure to check TBASI's references. Leaving aside the fact that these letters from members of COS about a competitor of COS could reasonably be perceived as not being entirely objective, the Tribunal is of the view that, having regard to the requirements of Article 506(6) of the *AIT*, DFO would not have had the discretion to take into account information contained in COS's bid in its evaluation of TBASI's competing proposal. Accordingly, the RFP did not provide for the consideration of such extraneous information in the evaluation of proposals.

Alleged Resort to Undisclosed and Irrelevant Considerations

45. COS submitted that the scoring of its responses to the rated criteria indicated that points were deducted on the basis of irrelevant considerations and/or a failure to understand the bid proposal as submitted. COS claimed that its proposal deliberately avoided repeating explicit requirements in the SOW. It noted that many of the deductions were due to COS's failure to explicitly restate the contractual requirements for certain work, which had been otherwise indirectly accepted in its bid proposal through the acknowledgement of the terms of the contract documents, including the SOW, rendering point deductions neither appropriate nor fair. In this regard, the Tribunal notes the following:

– Re. paragraph d. of rated criterion R3

46. Paragraph d. of rated criterion R3 in Table 2 of Appendix "D" to the RFP provides as follows:

In their proposal, Bidder should describe their proposed method to safeguard personal information and commercially sensitive data as set out in Section 3.4.4 and 3.4.5 of the [SOW].

47. Section 3.4.4 of the SOW requires the contractor to treat the VTOSS/INNAV and billing and collection data as commercially sensitive and confidential and reads as follows:

3.4.4. Ownership and Use of MNSF Billing Data for Other Purposes

The Government of Canada is the sole owner of the VTOSS/INNAV and billing and collection data, but the Contractor may use the VTOSS/INNAV and billing and collection data to perform analysis related to the billing and collection function. Similarly, fee-paying clients can receive their own billing information. However, the disclosure to any party outside of the billing and collection unit of the Contractor's organization, of any VTOSS/INNAV or MNSF billing and collection information that is unrelated to billing and collection functions identified in the [SOW] requires the prior written consent of CCG/DFO. *The Contractor will consider this information commercially sensitive and will treat it consistently in a confidential manner.* In the event of unapproved release of this information, the Government of Canada retains the option to terminate the contract.

[Emphasis added]

48. Through its incorporation by reference into paragraph d. of rated criterion R3 in Table 2 of Appendix "D" to the RFP, section 3.4.4 of the SOW became an integral part of that criterion. As such, it is more than a mere "statement of policy", as was asserted by COS.¹⁹ Accordingly, paragraph d. of rated criterion R3, properly read, required, among other things, that a proposal describe the bidder's proposed method to safeguard VTOSS/INNAV and billing and collection data, which the contractor was required to treat as commercially sensitive.

19. *Ibid.*, para. 26.

49. COS argued that its bid had addressed the issue of document security in very clear terms under the heading “Data Integrity, Security and Confidentiality”, which provides details on the specific methods that had been implemented by COS to protect data, including network user accounts and passwords, database user accounts and passwords, firewalls, anti-virus protection and data recovery systems. COS also submitted that the details of its document security and protection procedures were included in its proposal under the heading “Protection of Personal Information”.

50. COS also argued that it could not see why it was being questioned on the issue of document security, given that it had been appointed an agent of trust for the issuance of security passes by the then Vancouver Port Authority (now Port Metro Vancouver), as noted in its bid proposal. It also submitted that there had never been any issue of COS complying with any privacy laws or document security requirements when it provided the same services from 1996 to 2005.

51. In the Tribunal’s opinion, these latter arguments are inapposite because they refer to experience that was not clearly demonstrated in the proposal to be related to the rated requirement at issue. As discussed above, paragraph d. of rated criterion R3 requires that a proposal describe the bidder’s proposed method to safeguard personal information and data considered commercially sensitive under the RFP, in the form of the VTOSS/INNAV and billing and collection data. The fact that COS is currently safeguarding or might have demonstrated in the past an ability to safeguard personal information and commercially sensitive data is beside the point, as it does not specifically address the safeguarding of the particular information and data at issue under the terms of the RFP.

52. The notes in the evaluation spreadsheet in respect of the scoring of COS’s proposal under paragraph d. of rated criterion R3 indicate a deduction of points because “[t]here are no references or acknowledgement of the sensitivity of the VTOSS/INNAV or billing and collection data and the requirements relating to them as set out in 3.4.4.”²⁰ In particular, the GIR notes that “[t]he COS proposal contained no description of a proposed method for how the commercially sensitive data identified in Section 3.4.4 of the [SOW] would be safeguarded.”²¹

53. In the Tribunal’s view, COS’s loss of points under this rated criterion was due not to the evaluation of its bid proposal on the basis of undisclosed or irrelevant considerations, but rather due to the failure to include in the proposal a methodology specifically directed at the safeguarding of VTOSS/INNAV and billing and collection data in accordance with the particular information usage and disclosure parameters set out in section 3.4.4 of the SOW. In this regard, while COS’s bid proposal set out the security mechanisms that it had put in place to protect its own information, it did not specify whether, which of, or how those mechanisms (or any other mechanisms) would be specifically applied to the safeguarding of the information referred to in section 3.4.4 of the SOW, which was subject to the specific usage and disclosure terms specified in that provision. As the Tribunal has noted in the past, it is incumbent upon the bidder to ensure the responsiveness and clarity of its bid proposal.²²

54. The Tribunal therefore finds no basis to conclude from the information on the record that the evaluation of COS’s proposal under this rated criterion was unreasonable.

20. Complaint, tab 10.

21. GIR at 28.

22. *Complaint Filed by Trans-Sol Aviation Service Inc.* (13 May 2008) PR-2008-010 (CITT).

– Re. paragraph b. of rated criterion R4

55. Paragraph b. of rated criterion R4 in Table 2 of Appendix “D” to the RFP provides as follows:

In their proposal, bidder should identify: the key elements of a plan; the human resources; and the communications and system capacity to respond in a timely manner to inquiries, concerns and disputes raised by fee-paying clients and their representatives as set out in Section 3.8 (inclusive) of the[SOW].

56. In this regard, section 3.8 inclusive of the SOW (i.e. sections 3.8, 3.8.1 and 3.8.2 thereof) contains detailed requirements covering “Client Relations”, “Client Service Standards” and “Client Communications”, respectively.²³ Through its incorporation by reference into paragraph b. of rated criterion R4, section 3.8 inclusive of the SOW became an integral part of that criterion. As such, it is more than a mere “statement of policy”, as was asserted by COS, with bidders having to address each of these requirements.²⁴

57. The justification provided in the GIR evaluation spreadsheet for the deduction of points in respect of paragraph b. of rated criterion R4 is that the “[p]roposal does not identify all key elements of a plan that demonstrate that the Contractor would respond to concerns . . . by . . . fee-paying clients as set out in section 3.8.”²⁵ In this regard, the supporting notes in the evaluation spreadsheet in respect of that criterion, and in particular of section 3.8 inclusive of the SOW referred to therein, identify several alleged deficiencies in COS’s proposal. In the Tribunal’s view, the assessment that COS’s proposal was deficient as to certain required elements was reasonable. For example, the proposal did not specifically address the following requirements:

- section 3.8 (“Client Relations”): “The Contractor will submit [a meeting agenda] to recognized Western Region marine industry organizations that represent fee-paying clients, including domestic and international cargo shipping, ferries and cruise ships”;
- section 3.8 (“Client Relations”): “At the conclusion of every meeting for which an agenda was prepared, the Contractor will prepare a summary of the main points of discussion for the review and comment of all meeting participants, and submit a final copy to CCG Maritime Services Directorate”;
- section 3.8.1 (“Client Service Standards”): “The Contractor will communicate the service standards in writing to DFO and to fee-paying clients within 60 days of the start of the contract”; and
- section 3.8.2 (“Client Communications”): “Within 60 days of the start of the contract, the Contractor will post [specified] information on its website.”

58. The Tribunal notes, in this regard, that Appendix “D” to the RFP specifically advised that “[i]t is in the prospective Contractor’s best interest to respond fully to these criteria as it is the criteria on which technical points will be scored.”

59. Regarding COS’s other arguments based on outside facts/considerations (e.g. affiliations with domestic shipping organizations), the Tribunal is of the view that, given the requirements of Article 506(6) of the *AIT*, the evaluators do not have the discretion to use personal knowledge of a bidder or to take into account information extraneous to the proposal itself in their evaluation exercise. For this reason, these arguments do not provide the Tribunal with valid grounds to interfere with DFO’s evaluation of COS’s proposal.

23. RFP at 26-27.

24. Complaint, tab A, para. 29.

25. GIR at 36.

60. Finally, the Tribunal notes that COS's proposal received the maximum number of points that could be awarded, according to the instructions, to a proposal determined to be deficient as to certain required elements under section 3.8 of the SOW.²⁶

61. It is therefore the Tribunal's view that the evaluation of COS's proposal under paragraph b. of rated criterion R4 was reasonable and does not justify its intervention.

62. Finally, regarding COS's assertion that the evaluators have otherwise not conducted the evaluation in a procedurally fair way, as noted above, the Tribunal finds no basis to conclude from the information on the record that the evaluation fell short of the mark in this regard.

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

Costs

64. DFO did not request its costs in responding to this complaint. Therefore, in accordance with Tribunal practice, none shall be awarded.

DETERMINATION OF THE TRIBUNAL

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

26. Appendix "D" to the RFP at 47.