



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2010-046

Falconry Concepts

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, December 29, 2010*

*Reasons issued
Monday, January 10, 2011*

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IN THE MATTER OF a complaint filed by Falconry Concepts 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

FALCONRY CONCEPTS

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 Falconry Concepts. Pursuant to Article 4.1 and Appendix A to the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, 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 in Article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey

Presiding Member

Dominique Laporte

Dominique Laporte

Secretary

The statement of reasons will be issued at a later date.

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Director: Randolph W. Heggart

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STATEMENT OF REASONS

COMPLAINT

1. On August 14, 2010, Falconry Concepts (Falconry) 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 concerning a procurement (Solicitation No. W0125-09K129/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of wildlife control services for the aircraft runways and surrounding areas at Canadian Forces Base (CFB) Trenton and Mountain View, Ontario.
2. Falconry alleged that amendments to the Request for Proposal (RFP) issued prior to the bid closing date were unfair and unrealistic, as they made the terms and conditions of the solicitation so onerous that only the incumbent would be able to bid.
3. Falconry further alleged that PWGSC incorrectly declared its proposal non-compliant with the requirements of the solicitation. Specifically, Falconry challenged the evaluators' findings regarding the non-compliance of its proposal with one mandatory requirement. Falconry also challenged the total of points awarded to its proposal with respect to certain point-rated criteria. Falconry requested, as a remedy, that PWGSC conduct a re-evaluation of the proposals submitted in response to the solicitation.²
4. According to Falconry, its proposal complied with the mandatory requirements of the solicitation and it would have obtained the minimum required score for the point-rated criteria set out in the RFP had it been properly evaluated. Falconry also alleged that it should have been awarded the contract, since its proposal was the lowest compliant one, and it displayed that it could provide a better service than the successful bidder.
5. On August 24, 2010, the Tribunal informed the parties that the complaint had been accepted, in part, 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*.³ In accepting the complaint for inquiry, the Tribunal limited its inquiry to Falconry's allegation that PWGSC erred in its evaluation of Falconry's proposal. On August 27, 2010, PWGSC confirmed to the Tribunal that a contract had been awarded to Falcon Environmental Services Inc. (F.E.S.).
6. On September 20, 2010, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On October 6, 2010, pursuant to rule 104, Falconry filed its comments on the GIR.

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

2. In this regard, Falconry submitted that PWGSC should retain the services of a qualified individual with expertise in the areas of wildlife control and biology (as opposed to expertise as an aircraft pilot) to re-evaluate the proposals.

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

4. S.O.R./91-499 [*Rules*].

7. Neither Falconry nor PWGSC requested that a hearing be held. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing pursuant to subrule 105(1) of the *Rules* was not required and, according to paragraph 25(c), disposed of the complaint on the basis of the written submissions.

PROCUREMENT PROCESS

8. On March 30, 2010, PWGSC issued the RFP for wildlife control services. PWGSC subsequently issued amendment Nos. 1 to 6 to the RFP at various dates from May 13 to June 9, 2010. The amendments included questions and answers from potential bidders and amendments to the RFP. Through the amendments, the closing date of the solicitation was extended from May 26 to June 16, 2010. A mandatory site visit was held on May 11, 2010.

9. On May 26, 2010, Falconry copied the Minister of Public Works and Government Services on a letter sent to the Minister of National Defence objecting to amendment No. 1 to the RFP. On June 4, 2010, Falconry sent a letter directly to the Minister of Public Works and Government Services objecting to amendment No. 1 to the RFP. Falconry subsequently sent letters to officials of PWGSC that also contained grievances concerning the various amendments to the RFP.

10. On June 25, 2010, the Minister of Public Works and Government Services replied to Falconry's initial letter, indicating that Falconry's concerns were taken seriously, but that appropriate amendments to the RFP were issued in order to provide responses to questions received from potential bidders. PWGSC thereby denied relief to Falconry regarding its objection to the amendments to the RFP. Indeed, the letter made it clear that PWGSC considered that all the amendments were warranted, thereby indicating that the terms and conditions of the RFP would not be further amended to address Falconry's concerns.

11. Bids closed on June 16, 2010. PWGSC received three proposals, including one from Falconry. On July 30, 2010, PWGSC advised Falconry that the contract had been awarded to F.E.S.

12. On August 3, 2010, Falconry sent an e-mail to PWGSC requesting a copy of its technical evaluation. On August 4, 2010, PWGSC provided Falconry with the debriefing notes from the technical evaluation of its proposal.

13. On August 13, 2010, Falconry provided PWGSC with its comments on the evaluation of its proposal in response to the RFP. Falconry claimed that PWGSC's evaluation displayed a total lack of knowledge of current and past wildlife control at CFB Trenton and of the actual requirements of the RFP.

14. On August 14, 2010, within 10 working days after the receipt of PWGSC's August 4, 2010, correspondence, Falconry filed its complaint with the Tribunal.

PRELIMINARY MATTER

Ground of Complaint not Accepted for Inquiry

15. Falconry alleged that the amendments to the RFP were unfair and unrealistic, in that they made the solicitation so onerous that only the incumbent would be able to bid and, as a result, rendered the procurement process prejudicial and unfair.

16. On August 24, 2010, the Tribunal informed the parties that Falconry's allegation regarding the amendments to the RFP had not been accepted for inquiry, as this ground of complaint had not been filed with the Tribunal within the time limit prescribed by subsection 6(2) of the *Regulations*. The following are the Tribunal's reasons for its decision not to inquire into this ground of complaint.

17. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal "... not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier."

18. Subsection 6(2) of the *Regulations* states that "[a] potential supplier who has made an objection . . . to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier."

19. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

20. The Tribunal considered that Falconry made an objection to PWGSC regarding the amendments to the RFP within the designated time, by bringing the matter to the attention of the Minister of Public Works and Government Services as early as May 26, 2010.

21. However, the Tribunal found that, once Falconry received the letter dated June 25, 2010, from the Minister of Public Works and Government Services, it received a denial of relief concerning all its grievances regarding the amendments to the RFP. As noted above, this letter clearly indicates that, in PWGSC's view, all the amendments issued were appropriate. As such, upon receipt of PWGSC's June 25, 2010, letter, Falconry knew or ought to have known that PWGSC would not review or cancel the previously issued amendments.

22. In order for Falconry's complaint to be considered to have been filed in a timely manner, it would have needed to be filed within 10 working days of receiving the denial of relief, or by July 12, 2010 (i.e. 10 working days after June 25, 2010).⁵ Given that the complaint was not filed with the Tribunal until August 14, 2010, the Tribunal concluded that this ground of complaint was not filed within the prescribed time limit and, therefore, did not accept it for inquiry.

TRIBUNAL'S ANALYSIS

23. Section 30.14 of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint and, at the conclusion of the inquiry, 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.

5. July 1, 2010, was a statutory holiday and, as such, was not counted in the calculation of the 10 working days.

24. Section 11 of the *Regulations* 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 *North American Free Trade Agreement*,⁶ the *Canada-Chile Free Trade Agreement*,⁷ the *Canada-Peru Free Trade Agreement*⁸ and the *Agreement on Internal Trade*.⁹

25. Article 1013 of *NAFTA* provides that the tender documents "...shall contain all information necessary to permit suppliers to submit responsive tenders... [and] shall also include... the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders..."

26. Similarly, Article 1015(4) of *NAFTA* provides as follows:

An entity shall award contracts in accordance with the following:

a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

d. awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; and

...

27. The *CCFTA* and the *CPFTA* contain similar provisions.

28. 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."

29. The issue before the Tribunal is whether PWGSC evaluated Falconry's proposal in accordance with the requirements set out in the tender documents. The Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluation of proposals.¹⁰ The Tribunal will interfere only with an evaluation that is unreasonable. In previous determinations, the Tribunal has stated that a determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.¹¹

6. *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*].

7. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*]. Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.

8. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

9. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

10. *Re Complaint Filed by Chamber of Shipping of British Columbia* (24 March 2010), PR-2009-069 (CITT).

11. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT); *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and Notra Inc.* (5 November 2008), PR-2008-023 (CITT).

30. In view of Falconry's grounds of complaint that were accepted for inquiry, the Tribunal must first assess whether PWGSC committed a reviewable error in determining that Falconry's proposal did not meet a mandatory requirement set out in the RFP. The relevant provisions of the RFP are summarized below.

31. Section 2, "**Basis of Selection**", of Part 4 of the RFP provides that, "[t]o be compliant the Bidder's proposal must: Meet all of the Mandatory Technical Criteria and Achieve a minimum score of 60% (1,200 points) for the Point Rated Criteria in Annex 4"

32. Similarly, section 1.1.1, "**Mandatory Technical Criteria**", of Part 4 of the RFP provides that "[p]roposals must comply with each and every mandatory requirement of this section. Failure to do so will render the proposal non-compliant. If a proposal is determined to be non-compliant, it will be given no further consideration."

33. Section 1.1.1(b) of Part 4 of the RFP included the following mandatory requirement with respect to "Wildlife Services Contract experience":

The Bidder must provide with their bid, documentation to prove that the legal entity which is submitting the bid has a minimum of 5 years of Wildlife Services Contract experience (within ten years from the closing date of this requirement) that is similar to this requirement. If the bid includes descriptions of more than this amount of experience, Canada will decide, at [its] discretion, which ones to evaluate.

Similar experience must include all of the following for each duration of the experience and must be as a minimum:

- (a) Wildlife Control for an airfield of similar size and scope to Trenton: airfield geographic size of fenced area (44,000 square feet runway length of 10,000 ft.);
- (b) Annual aircraft movements – military movements (arrivals and departures) 15,411; civil movements 16,160; Instrument Flight Rules (IFT) 16,481; Visual Flight Rules (VFR) 15,090; total 31,571;
- (c) The use of similar types of aircraft including: fast moving jets, helicopters, slower large jet transport aircraft i.e. Airbus 300/310, propeller driven Hercules aircraft[;]
- (d) The Wildlife Control methods incorporated the use of birds of prey.

For this Mandatory Requirement the Bidder must provide as a minimum, the following information as per the attached Annex 5:

- 1) The Customer's name and address for each similar Contract.
- 2) The name, title, telephone number and e-mail address (unless the individual does not have an e-mail address) for a customer reference that can confirm the information provided by the Bidder. If there is a conflict between the information provided by the customer reference and the bid, the information provided by the customer reference will be evaluated instead of the information in the bid. . . .
- 3) The Start and End dates for each similar Contract.
- 4) The description of the service that was provided by the Bidder for each similar Contract. The description(s) must prove that the service was similar to the service required in this RFP.
- 5) The value of the Contract.
- 6) The Contract must have been performed by the Bidder itself (and does not include the experience of any proposed subcontractor or any affiliate of the Bidder). . . .

34. Falconry's proposal included the following information in response to this criterion:

The legal entity David Ascott / Falconry concept has 8.8 years of Airdrome Wildlife Control Contract experience at 8 Wing Trenton. Dave worked from December 1996 for Intercept Wildlife Control and worked until the end of April 1997. He then worked from May 1997 to September 2005 with Falcon Environmental Services. Falconry was used as a control method the entire period. David has held a valid . . . Falconry License since 1999 when the Province of Ontario required Falconers to be licensed.¹²

35. In addition, the evidence indicates that Mr. David Ascott is the sole proprietor of Falconry and has been doing business as the owner/operator of this non-incorporated entity since December 2006.

36. PWGSC determined that Falconry's proposal did not comply with the mandatory requirement regarding "Wildlife Services Contract experience". The evaluators provided the following comments in this regard:

Non-Compliant: Falconry Concepts or Dave Ascott the business entity has not provided similar services under contract as a company. Dave Ascott has only worked as an employee of companies, which provided this service. Dave Ascott has no experience in: oversight and management of a similar airport wildlife control program as a company; or administration activities or required business activities associated with the operation of a similar airport wildlife control contract.¹³

37. Falconry submitted that this statement is incorrect and misleading. It submitted that it worked on multiple contracts at CFB Trenton, which met all the requirements as indicated in its bid.

38. Falconry submitted that while Mr. Ascott, the owner/operator of Falconry, was in the past an employee of F.E.S., through his work for this company, he essentially performed the ensemble of managerial duties required by the present RFP, with the exception of invoicing.

39. Falconry further claimed that its proposal contained all the information requested in Annex 5 of the RFP. It submitted that it has otherwise been in business for four years and has performed all the administration and required business activities associated with the operation of a wildlife control services contract.

40. PWGSC submitted that the term "Wildlife Services Contract experience", on its plain meaning and in the context of the terms of the RFP, referred to experience in contracting for the provision of "wildlife services", as described in the RFP. PWGSC noted that the specific requirements for prior contracts, set out in section 1.1.1(b) of Part 4 of the RFP included the express stipulation that "[t]he Contract must have been performed by the Bidder itself"

41. PWGSC submitted that experience as an employee of a provider of wildlife services, rather than as a contractor providing such services, did not suffice to meet the requirements of the mandatory criterion at issue.

42. PWGSC further submitted that the bidder, or rather the "legal entity which is submitting the bid" in this matter, was in fact Mr. Ascott, doing business as Falconry. Therefore, in PWGSC's view, the issue is whether Mr. Ascott, doing business as Falconry, had sufficient experience as a contractor for the supply of the requested services.

12. See public version of complaint.

13. GIR, exhibit 15.

43. PWGSC submitted that the owner/operator of Falconry has never been the actual contractor for the supply of wildlife control services for an airfield with the scope and operations as described and required in the RFP and that, as such, no evidence of this mandatory experience was or could have been provided in Falconry's proposal.

44. The Tribunal notes that PWGSC has interpreted the mandatory criterion concerning "Wildlife Services Contract experience" as a requirement to demonstrate minimum experience as a contractor for the supply of wildlife control services at an airfield that is similar to CFB Trenton's.

45. In contrast, Falconry has taken the position that the prior experience of its principal, Mr. Ascott, as a former employee of F.E.S. (a company which has held contracts for the supply of such services in the past), should qualify as similar experience under the RFP, since Mr. Ascott is the one who physically performed wildlife control at CFB Trenton and similar locations.

46. The Tribunal must therefore decide whether PWGSC's interpretation of the terms "Wildlife Services Contract experience", in the sense of experience as the actual contract holder, is reasonable as opposed to Falconry's position to the effect that experience as an employee working for an entity which held contracts for the supply of such services, is sufficient to qualify as "Wildlife Services Contract experience".

47. In this regard, the Tribunal notes that the RFP does not contain a specific definition of the term "Wildlife Services *Contract* experience" [emphasis added].

48. While section 1.1.1(b) of Part 4 of the RFP includes a general definition of the scope of the required "similar experience" in the area of wildlife control at an airfield, this provision does not include specific language on the meaning of the term "*Contract* experience" [emphasis added] and, as such, does not expressly address all the issues with regard to the meaning of the term "Wildlife Services Contract experience". In particular, there is no definition of the terms "Contract" and "Contract experience" in this context.

49. However, a contextual reading of the provision, which is necessary to determine its meaning and discern the intentions of the procuring entity, supports PWGSC's interpretation that the term "Wildlife Services Contract experience" referred to experience in contracting and the management of a contract for the provision of wildlife control services.

50. Indeed, had PWGSC intended to only require that a bidder demonstrate a minimum of five years of experience in the provision of wildlife control services, it could have used these terms in section 1.1.1(b) of part 4 of the RFP. The fact that it chose to use the term "Wildlife Services Contract experience" suggests that there is a distinction between personal experience in providing wildlife control services and the type or nature of the experience contemplated by section 1.1.1(b).

51. PWGSC's position that the term "Wildlife Services Contract experience" does not cover experience as an employee of a supplier of wildlife control services is also supported by the fact that the RFP contains separate requirements relating to the experience of a "Senior Wildlife Control Officer" and a "Wildlife Control Officer" to be proposed by bidders.¹⁴

14. Sections 1.1.1(c) and (d) of Part 4 of the RFP.

52. As was noted by PWGSC in the GIR, the prior experience requirements for such officers do not relate to “contracts” but to “performing wildlife control” and “experience using birds of prey to control wildlife on an aerodrome”. The Tribunal considers that these provisions are consistent with an interpretation that gives “Wildlife Services Contract experience” a meaning that goes beyond experience as an individual performing wildlife control operations on an airfield.¹⁵

53. Moreover, section 1.1.1(b) of Part 4 of the RFP required a bidder to provide detailed information concerning past experience in relation to “each *similar Contract*” [emphasis added]. In the normal course of business, it is only the party to a contract (i.e. the contractor) that would be in the position to provide accurate and complete information of the type that is requested from bidders (e.g. the start and end dates of the contract, the value of each similar contract).

54. In the Tribunal’s view, this emphasis on obtaining detailed information on prior similar contracts suggests that PWGSC intended to ensure that a bidder be able to demonstrate minimum experience as a holder of such contracts or as a contractor for the supply of wildlife control services.

55. This interpretation is further reinforced by the fact that section 1.1.1(b) of Part 4 of the RFP expressly stipulates that “[t]he Contract must have been *performed by the Bidder itself* (and does not include the experience of any proposed subcontractor or any affiliate of the Bidder)” [emphasis added].

56. This provision indicates that the mandatory criterion required a bidder to demonstrate its *past performance* of similar contracts for the supply of the specified wildlife control services, rather than merely demonstrate experience in performing daily wildlife control tasks or using the specified wildlife control methods.

57. As a matter of law, a contract is performed by the party that is bound by its terms, that is, in this case, necessarily the entity that held similar contracts for the supply of wildlife control services. While an employee fulfills contractual obligations towards his employer, an employee does not, in law, perform the contracts entered into by his employer. A contract is a binding agreement between two adhering parties, which is defined by the content of the agreement itself. In contrast, an employee is considered a third party to the liabilities and entitlements of the said agreement. The legal relationship of an employee with a party to a contract is in many ways foreign to the tenants of the contract itself.

58. Put another way, the fact that a contractor hires an employee to assist it in discharging its obligations under a contract does not qualify the employee to report having performed the contract. In order to perform a contract for the supply of wildlife control services, one must be a party to that contract.

59. Consequently, after having considered the terms of the RFP as a whole, the Tribunal is of the view that PWGSC’s interpretation that only an entity which has a minimum of five years of experience as a contractor for the supply of wildlife control services could demonstrate compliance with the relevant mandatory requirement is reasonable in the circumstances.

60. This means that, although the owner/operator of Falconry has considerable experience in conducting wildlife control operations as an employee, this experience does not suffice to meet the mandatory requirement of the RFP.

15. GIR, exhibit 1.

61. That is not to say that Falconry would not be capable of providing the wildlife control services contemplated by the procurement. To the contrary, the evidence indicates that Falconry's sole proprietor has substantial experience and expertise in the field. However, the Tribunal accepts PWGSC's submission that, in determining compliance with the relevant mandatory criterion, the issue was whether Falconry had experience as a contractor providing the services contemplated by the procurement.

62. On this issue, it is not disputed that the bidder (i.e. the legal entity which submitted the bid) was Mr. Ascott, doing business as Falconry. The fact that Falconry is an unregistered entity whose sole proprietor is Mr. Ascott does not disqualify it from bidding on the RFP on the sole basis of its legal status. Law allows for individuals operating under unregistered denominations to propose their services as legal entities to a contract.

63. While the Tribunal considers that Falconry was entitled to submit a proposal in response to the RFP,¹⁶ the evidence before the Tribunal indicates that Falconry's proposal did not demonstrate that, as the legal entity which submitted the bid, it had the required experience as a contractor for the specified wildlife control services. The experience information that Falconry provided was limited to that of an employee of other contractors.

64. Specifically, the information that Falconry provided concerned contracts to which neither Falconry nor its sole proprietor, Mr. Ascott, was a party. It is clear that Falconry was not the contract holder or the contractor in those instances and that, therefore, such contracts cannot, as a matter of law, be found to have been performed by Falconry.

65. As such, the contracts in question were not performed by the bidder itself (i.e. Falconry) as is required by section 1.1.1(b) of Part 4 of the RFP. Rather, they were performed by other legal entities, namely, F.E.S. and Intercept Wildlife Control. In short, Falconry's proposal appears to demonstrate the "Contract experience" of other legal entities as opposed to its own.

66. With respect to Falconry's comments to PWGSC as of August 13, 2010, to the effect that, while an employee of F.E.S., Mr. Ascott performed certain managerial duties, the Tribunal considers that these allegations are irrelevant since, as it has previously determined, the issue under consideration is Falconry's experience as the party with the ultimate responsibility for the performance of a contract, i.e. as a contractor, not its experience as an employee of another contractor.

67. In any event, the Tribunal accepts PWGSC's submission that, since the information provided on August 13, 2010, was not included in Falconry's proposal, it could not have been taken into account during the evaluation process, even if it had been relevant.

68. In view of the foregoing, the Tribunal finds that PWGSC's determination that Falconry's proposal did not meet the mandatory requirements of minimum "Wildlife Services Contract experience" was made in accordance with the requirements set out in the tender documents and was well founded and, therefore, reasonable. For this reason, there is no basis to interfere with this decision.

69. Despite this conclusion, the Tribunal notes that, in the RFP, PWGSC could have better defined the terms "Contract" or "Wildlife Services Contract experience".

16. In this regard, there is no indication that a particular corporate structure was required to constitute a legal entity authorized to bid. A small non-incorporated individual business is a legal entity.

70. It would have been advantageous to all parties if the RFP had contained a simple definition of either of these terms. Had PWGSC provided, in the solicitation documents, an explicit and clear indication that it required each bidder to demonstrate that it had a minimum of five years of experience as a “contractor” for the supply of wildlife control services for an airfield with the scope and operations as the one described in the RFP, it is conceivable that the issue of Falconry’s compliance with this requirement would not have become the subject of a complaint with the Tribunal.

71. The Tribunal is mindful that, in its complaint, Falconry also challenges certain scores that its proposal received as a result of PWGSC’s evaluation of the point-rated technical criteria set out in the RFP.

72. As the Tribunal has concluded that PWGSC did not make any reviewable error in determining that Falconry’s proposal was non-compliant with the mandatory criterion set out in section 1.1.1(b) of Part 4 of the RFP, the Tribunal does not need to examine PWGSC’s evaluation of Falconry’s response to the point-rated technical criteria set out in the RFP in order to dispose of this complaint.

73. As noted above, the RFP made it clear that the failure to comply with any mandatory criterion meant that a proposal would not be given further consideration. Thus, the Tribunal’s finding in respect of Falconry’s other allegation means that Falconry is no longer eligible for contract award.

74. Simply put, Falconry could not be awarded the contract even if the Tribunal were to find that its proposal should have been awarded at least the minimum score of 60 percent (1,200 points) for the point-rated technical criteria in Annex 4 of the RFP. In these circumstances, it is therefore not necessary for the Tribunal to examine the issue of whether the scores that were awarded by PWGSC’s evaluators were reasonable in light of the information that was included in Falconry’s proposal.

75. Finally, the Tribunal notes that, in Falconry’s comments on the GIR, certain allegations and issues that are not contained in the complaint were raised for the first time. These include a specific allegation that one of PWGSC’s evaluators may have been in a situation of conflict of interest and, more generally, allegations that the evaluation was performed by a team of unqualified individuals.

76. The Tribunal considers these allegations to be new grounds of complaint, which were not included in the initial complaint which the Tribunal considered and accepted for inquiry within the compulsory legislative time frame. The Tribunal notes that the grounds of complaint cannot simply be changed or supplemented after a complaint is accepted for inquiry.

77. Indeed, the acceptance of new grounds of complaint 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.

78. For these reasons, the new grounds of complaint introduced by Falconry in its comments on the GIR were not considered by the Tribunal.

Costs

79. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

80. The Tribunal finds that the present procurement was moderately complex; there were various questions posed to PWGSC regarding the requirements of the RFP, and two amendments were issued. The complaint was of low complexity, as it involved only the one issue of qualification as a bidder. The complaint proceedings were also of low complexity, as there were no motions, no interveners and no hearing.

81. Considering these three factors, the Tribunal's preliminary view is that this complaint case has an overall complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The Tribunal therefore determines that the preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

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

83. Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Falconry. Pursuant to article 4.1 and Appendix A to the *Guideline*, 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 in article 4.2 of the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Jason W. Downey
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Presiding Member