



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DETERMINATION AND REASONS

File No. PR-2010-078

Accipiter Radar Technologies Inc.

v.

Department of Fisheries and  
Oceans

*Determination and reasons issued  
Thursday, February 17, 2011*

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL .....	i
STATEMENT OF REASONS .....	1
COMPLAINT.....	1
PROCUREMENT PROCESS.....	1
TRIBUNAL'S ANALYSIS.....	2
Evaluation Against Mandatory Requirements .....	2
Evaluation Against Rated Criteria .....	3
Rated Criterion R1 .....	5
Rated Criterion R2 .....	10
Rated Criterion R3 .....	10
Rated Criterion R4 .....	11
Rated Criterion R5 .....	12
Conclusion.....	15
Costs .....	15
DETERMINATION OF THE TRIBUNAL.....	15

IN THE MATTER OF a complaint filed by Accipiter Radar Technologies Inc. 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**

**ACCIPITER RADAR TECHNOLOGIES INC.**

**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

Tribunal Member: Pasquale Michael Saroli, Presiding Member  
Director: Randolph W. Heggart  
Senior Investigator: Cathy Turner  
Counsel for the Tribunal: Eric Wildhaber  
Complainant: Accipiter Radar Technologies Inc.  
Government Institution: Department of Fisheries and Oceans  
Counsel for the Government Institution: Daniel Roussy

Please address all communications to:

The Secretary  
Canadian International Trade Tribunal  
Standard Life Centre  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario  
K1A 0G7

Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [secretary@citt-tcce.gc.ca](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### COMPLAINT

1. On November 25, 2010, Accipiter Radar Technologies Inc. (Accipiter) 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> concerning a procurement (Solicitation No. FP802-100131) by the Department of Fisheries and Oceans (DFO) for the provision of a cross-polarized radar integration, processing and display software package for the Canadian Coast Guard ice hazard radar.

2. Accipiter alleged that DFO improperly evaluated its proposal and unfairly deemed it non-compliant. Specifically, it alleged the following: (1) the bid evaluators made several, separate numerical errors; (2) the bid evaluators did not believe the information provided by Accipiter and hence, in effect, are accusing it of falsifying its proposal; and (3) the bid evaluators did not follow the evaluation criteria published in the solicitation document.

3. Accipiter requested, as a remedy, that the Tribunal recommend that DFO re-evaluate its proposal in a fair and equitable manner and that, should its proposal be deemed compliant and be found to have obtained the highest total points, the contract be awarded to Accipiter. In the alternative, if the existing contract cannot be terminated, Accipiter requested that the Tribunal recommend that DFO issue an additional contract to Accipiter for the same work. In the further alternative, Accipiter requested that the Tribunal recommend that DFO compensate it for its lost profit. Accipiter also requested the reimbursement of its reasonable costs incurred in preparing and proceeding with the complaint.

4. On December 2, 2010, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

5. On December 6, 2010, DFO informed the Tribunal that a contract had been awarded to Rutter Inc. On December 23, 2010, DFO filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> On January 8, 2011, Accipiter filed its comments on the GIR.

6. 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

7. On August 6, 2010, DFO issued a Request for Proposal (RFP) for the provision of a cross-polarized radar integration, processing and display software package for the Canadian Coast Guard ice hazard radar. On October 21, 2010, bids closed. According to DFO, two proposals were received. On November 15, 2010, DFO awarded a contract to Rutter Inc. That same day DFO advised Accipiter that its proposal did not comply with the minimum rated score of 70 percent of the maximum possible points in each of rated criteria categories 1 to 5 as required in the RFP.

---

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

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

3. S.O.R./91-499.

8. On November 16, 2010, Accipiter informed DFO of its concerns regarding the evaluation of its proposal and requested a debriefing. According to DFO, the debriefing was held on November 25, 2010. On November 25, 2010, Accipiter 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. 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* 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*,<sup>4</sup> the *Agreement on Internal Trade*,<sup>5</sup> the *Agreement on Government Procurement*,<sup>6</sup> the *Canada-Chile Free Trade Agreement*<sup>7</sup> and the *Canada-Peru Free Trade Agreement*.<sup>8</sup>

10. 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.” The other trade agreements have similar provisions.

11. Accipiter originally alleged three grounds of complaint, i.e. the technical bid evaluators (i) made several separate numerical errors in the scoring of its technical bid proposal, (ii) failed to consider relevant information submitted by Accipiter in support of its technical proposal, and (iii) did not follow the evaluation criteria in the RFP. The complaint was subsequently narrowed to the third ground, further to the following comment by Accipiter: “As a result of the Debrief Meeting and the GIR, we believe that item 3 above is the source of the discrepancy.”<sup>9</sup>

12. DFO submitted that the evaluation team carefully evaluated Accipiter’s proposal. It contended that Accipiter failed to demonstrate its understanding of the requirement and to identify the experience that it possessed in response to the rated criteria of the RFP. As such, the evaluators acted reasonably in making significant deductions of points from the maximum allowable with respect to the criteria.

### Evaluation Against Mandatory Requirements

13. The mandatory requirements are set out in Appendix “D”, “**EVALUATION CRITERIA**”, to the RFP.

14. Appendix “D” explicitly provides that “[p]roposals not meeting the mandatory criteria [would] be excluded from further consideration” and that only those proposals that met “**ALL**” mandatory criteria would be evaluated and rated against the rated criteria.

---

4. *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*].

5. 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*].

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)>.

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). 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).

9. Comments on the GIR at 4.

15. In the Tribunal's view, Accipiter's claims that its technical proposal was "... fully compliant in every Mandatory Requirement..." and that "[t]he evaluators agreed with Accipiter's claim of compliance for all of the Mandatory Requirement[s]" such that "... there is no dispute over this section of the evaluation" is borne out by a *prima facie* analysis of Accipiter's technical proposal itself<sup>10</sup> and by the fact that the reason cited in DFO's letter of November 15, 2010, for Accipiter's failure to win the contract was not the failure of its technical proposal to meet the mandatory requirements of the RFP, but rather its failure to meet the minimum rated score requirements of the rated criteria in the solicitation.

16. Indeed, because compliance with all the mandatory criteria in Appendix "D" to the RFP was a condition precedent to the scoring of its technical proposal against the rated criteria specified in the solicitation, the very fact that the evaluation team proceeded to the scoring of Accipiter's proposal necessarily implies that, as far as the evaluators were concerned, compliance with the mandatory criteria of the RFP was not in issue.

### Evaluation Against Rated Criteria

17. The specific rated criteria and associated scoring scheme are set out in Appendix "D" to the RFP as follows:

<b>Rated Criteria</b>	<b>Maximum Points</b>	<b>Proposed Resource(s) Experience</b>	<b>Point Scale</b>
<b>R1.</b> The proposed resource(s) average-years of previous relevant experience with marine radars, radar theory, microwave theory, control theory, mechanics and programming.	30		5 years = 10 pts 6 years = 20 pts 7 years + = 30 pts
<b>R2.</b> The proposed resource(s) *average-years of previous relevant experience related to SAR polarization research.	20		1 year = 5 pts 3 years = 10 pts 5 years + = 20 pts
<b>R3.</b> Points will be awarded for the proposed resource with demonstrated experience in the enhanced processing of marine radars.	20		Basic experience = 5 pts Fair experience = 10 pts Extensive experience = 20 pts
<b>R4.</b> Points will be awarded according to the depth, knowledge and experience of the company in project management skills and methodology.	10		Basic experience = 2 pts Fair experience = 5 pts Extensive experience = 10 pts
<b>R[5].</b> Points will be awarded according to the depth of the proposal and methodology that clearly demonstrates knowledge of the project requirements and presents it in a clear and concise manner.	20		Basic knowledge = 5 pts Fair knowledge = 10 pts Extensive knowledge = 20 pts
<b>Maximum Attainable Score</b>	<b>100</b>		

10. Refer, in particular, to paragraphs 2.3.1 to 2.3.9 of Accipiter's technical proposal, which can be found in the confidential GIR, tab I.

18. Appendix “D” to the RFP includes the following condition:

Bidders must attain a rating of at least 70% of the maximum possible points in each of the Rated Requirement categories 1 to 5 to be considered compliant. Proposals which fail to attain at least 70% in each of these categories will be considered technically non-responsive and no further evaluation will be conducted.<sup>11</sup>

19. Appendix “D” to the RFP goes on to specify the methodology to be used in calculating the proposed resources’ average years of experience, for purposes of applying the numerical point scale set out in the solicitation for each rated criterion, as follows:

Average-years = Total-number-of-years-of-experience-of-resource(s) / Total-number-of-resource(s)

20. The Tribunal further notes that the scoring scheme set out in Appendix “D” to the RFP for each rated criterion was specific and did not permit intermediary scores falling between the values prescribed in the point scale. Accordingly, the evaluators had no discretion as to the number of points that could be awarded once the number of years of experience and level of knowledge had been ascertained under a particular criterion.<sup>12</sup>

21. By letter dated November 15, 2010, DFO advised Accipiter that the rated criteria scoring table indicated that its technical proposal had failed to meet the 70 percent requirement in each of the five rated criteria. It stated as follows:

As indicated in the solicitation, a bid was required to meet each and every mandatory requirement. Unfortunately, the evaluating team determined that your bid did not comply with the minimum rated score of 70% of the maximum possible points in each of the Rated Requirement categories 1 to 5 as per Appendix “D” Evaluation Criteria – Rated Requirements.<sup>13</sup>

22. With the above as context, the Tribunal will next proceed to a consideration of Accipiter’s allegations in respect of each of the rated criteria as they relate to the point scoring of its technical proposal. In doing so, the Tribunal is mindful of the well-established standard of review in such inquiries, which was set out as follows by the Tribunal in File No. PR-2005-004:<sup>14</sup>

51. A procuring entity will satisfy its obligations under [Article 506(6) of the *AIT* and Article 1015(4)(d) of *NAFTA*] when it makes “. . . a reasonable evaluation, in good faith, of the competing bid documents submitted in response to the [solicitation] . . .” The Tribunal will interfere only with an evaluation that is *unreasonable*.

52. In *Law Society of New Brunswick v. Ryan*, referring to the Supreme Court of Canada’s earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, Iacobucci J., stated as follows:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a

---

11. This provision is hereafter referred to as the “70 percent requirement”.

12. GIR, para. 25 at 13.

13. The evaluation team determined that it was only in respect of rated criterion R4 that Accipiter’s technical proposal met the 70 percent requirement, its proposal having fallen short in respect of each of the other rated criteria.

14. *Re Complaint Filed by Northern Lights Aerobic Team, Inc.* (7 September 2005) [*Northern Lights*].



decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

In the Tribunal's opinion, the same principle applies with respect to the Tribunal's review of a procuring entity's evaluations under the trade agreements. In the past, the Tribunal has noted that it will substitute its judgement for that of 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.

[Footnotes omitted]

### Rated Criterion R1

23. Rated criterion R1 reads as follows:

The proposed resource(s) average-years of previous relevant experience with marine radars, radar theory, microwave theory, control theory, mechanics and programming.

24. DFO submitted that the criterion is "inclusive", as it uses the word "and" at the end. It submitted that, therefore, the proposed experience had to include experience in all these areas to be considered compliant.

25. The Tribunal agrees with DFO's submission that, by virtue of the use of the conjunctive "and", compliance with the criterion requires that proposed resources have experience in all the areas identified in the rated criterion. That being said, where more than one resource person is proposed, the criterion does not go so far as to require that each proposed resource have experience in each of the different areas specified in the criterion, it being sufficient that all these areas are covered by the proposed resource team in the aggregate.

26. In this regard, the Tribunal notes that the evaluators did not claim that Accipiter's proposed resources lacked experience in any of the individual areas identified in rated requirement R1. The issue before the Tribunal therefore relates not to the scope but to the quantum of Accipiter's proposed resources' average years of experience for the purposes of the prescribed scoring scheme.

27. DFO submitted that Accipiter identified a total of 14 team members who would participate in the project.<sup>15</sup> To calculate the average years of experience for Accipiter's resources, the evaluation team compiled a listing of all the relevant experience for every team member. The number of years of experience with marine radar projects was extracted from résumés and other information within the proposal. According to the evaluation results, Accipiter scored 20 points, which did not meet the 70 percent requirement.

28. Accipiter submitted that it proposed three resources for this criterion and that the average years of experience should have been calculated using only these resources.<sup>16</sup>

---

15. Confidential GIR, tab I at 30.

16. *Ibid.* at 35.

29. As already noted, Appendix “D” to the RFP specifies the following methodology to be used for calculating the proposed resources’ average years of experience for the purposes of applying the numerical point-scoring scheme prescribed for each of the rated criteria:

$$\text{Average-years} = \text{Total-number-of-years-of-experience-of-resource}(s) / \text{Total-number-of-resources}$$

[Emphasis added]

30. In its complaint, Accipiter indicated that its proposed resources’ average experience was 28 years. It submitted that the application of the prescribed rated criterion R1 point-scoring scheme to its claimed average years of experience would have resulted in the award of the full 30 points available under this criterion.

31. However, in its application of the prescribed formula for the calculation of average years of experience, the evaluation team took into account all 14 individuals identified by Accipiter in its technical proposal as comprising its project team.<sup>17</sup>

32. In this regard, the evaluation team

(i) adjusted the numerator

(a) to limit the years of experience claimed for 2 of the 3 resources proposed under rated criterion R1 to that actually relating to marine radar<sup>18</sup> and

(b) to take into account the marine-radar-related experience of the other 11 Accipiter project team members

and

(ii) adjusted the denominator to take into account all 14 resources comprising Accipiter’s project team,

---

17. *Ibid.* at 19.

18. Regarding the adjustments made to the numerator, the GIR at 12, para. 22, includes the following acknowledgement:

It is acknowledged that the Complainant has a fair amount of marine radar expertise but has also focused on other surface, airborne and space-based radar systems as well as other engineering projects. While many of the radar projects were related to homeland, port or inland waterways security applications, their intended purpose was not for use on vessels at sea; therefore it is submitted that the experience was not specifically relevant to the objectives of this project as stated in the RFP.

As noted by the Tribunal in the past, a rated criterion pertaining to relevant experience, read contextually, would logically be connected to identified tasks and deliverables under the solicitation (*Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and Notra Inc.* (5 November 2008), PR-2008-023 [CITT] at para. 28). In this regard, phase 2 deliverables under the SOW were clearly associated with “. . . the development of a cross-polarized [marine] radar system that will help the navigators distinguish between dangerous multi-year ice that is embedded in first-year ice, thereby reducing the risk of damage and improving the efficiency of navigation through consolidated Arctic ice” (GIR, tab C at 32). Similarly, the project objective, as described in the SOW, explicitly addressed the project tasks “. . . related to the integration of cross-polarized radar data from two separate receivers in real-time for display on a single screen, providing a distinct contrast between multi-year ice, first-year ice and other types of ice and open water” (GIR, tab C at 39).

That being the case, the Tribunal finds the adjustments which, in any event, were not directly contested, to have been reasonable in the circumstances.

which yielded an average of 6.3 years of experience. In accordance with the point-scoring scheme prescribed for rated criterion R1, Accipiter's proposal was awarded 20 points, which fell short of the minimum 21 points required by the 70 percent requirement for compliance with this criterion.<sup>19</sup>

33. DFO submitted that the RFP clearly defines the calculation of "average-years" as follows:

$$\text{Average-years} = \text{Total-number-of-years-of-experience-of resource(s)} / \text{Total-number-of-resource(s)}$$

It also submitted that, according to the defined approach, ". . . there was a need to take into account the total number of resources."<sup>20</sup>

34. Accipiter submitted that DFO's approach to calculating the average years of experience based on the entire team did not make sense. It submitted that "[nowhere] in Appendix "D" or the RFP does it indicate that if you propose a large and diverse Team . . . you will be penalized."<sup>21</sup>

35. The issue before the Tribunal can therefore be distilled down to the question of whether the word "resource(s)", in the context of its use in the methodology prescribed in Appendix "D" to the RFP for the calculation of average years of experience for the purposes of applying the point-scoring scheme also prescribed therein, should be construed in a narrow sense based on the resources specifically identified by the bidder under each rated criterion or more broadly to include the total relevant experience and total number of proposed resources comprising the bidder's project team.

36. The Tribunal notes that the RFP does not include a definition of the term "resource", which must therefore be discerned by other means.

(i) Generally Accepted Dictionary Definitions

37. Among the meanings that have been ascribed to the term "resource" are the following:

(i) ". . . a source of . . . support . . .";<sup>22</sup>

(ii) ". . . a source of information or expertise . . .";<sup>23</sup>

(iii) ". . . available assets . . .";<sup>24</sup> and

(iv) in specific reference to a person, ". . . a person . . . called upon as necessary to perform a certain task . . .".<sup>25</sup>

The Tribunal notes that these definitions are consistent with those specifically cited by Accipiter.<sup>26</sup>

---

19. The Tribunal notes that, although the point-scoring scheme in Appendix "D" to the RFP implies that a bidder could get a responsive rating by obtaining 70 percent in each of the five rated requirements, because of the way in which the scores are assigned, a bidder cannot receive less than 100 percent in each of the rated criteria in order to be responsive. For example, in rated criteria R1, the maximum points were 30; 70 percent of this would be 21. However, the point-scoring scheme only provided for a possible 10, 20 or 30 points. Therefore, in effect, the bidder must get the maximum points for each rated criterion in order to be responsive. The Tribunal notes that, in effect, the scoring methodology used amounted to a pass/fail methodology with the maximum score being a pass.

20. GIR, para. 15 at 11.

21. Comments on the GIR at 5.

22. *Merriam Webster's Collegiate Dictionary*, 11th ed., s.v. "resource".

23. *Ibid.*

24. *Shorter Oxford English Dictionary*, 5th ed., s.v. "resource".

25. *Ibid.*

26. Comments on the GIR at 4.

38. The Tribunal is of the view that, because each of the 14 individuals identified in Accipiter's proposal who comprised its project team would unquestionably be assets available to provide information, expertise and technical support in the completion of certain specified tasks and deliverables under the contract, they are individually and collectively describable as "resources".

(ii) Solicitation Documentation

39. In the Tribunal's view, the meaning of the word "resource(s)", in the methodology prescribed in Appendix "D" to the RFP for the calculation of the proposed resources' average years of experience is discernible from a broader contextual reading of that term.

40. The Tribunal notes, in this regard, that the solicitation documentation includes the following statement:

*Your proposal must include:*

1. An indication of an understanding of the requirement and objectives of *the project*;
2. A listing of personnel you propose to assign to carry out this work and resumes of each individual's qualifications and experience, particularly as it relates to this project, as per the evaluation criteria in Appendix "D";
3. A description of the firm's capability to carry out *this Work*.<sup>27</sup>

[Emphasis added]

41. The phrase "this work" in item 2 above is clearly in relation to "the project" referred to in item 1. Furthermore, it is clear from the SOW that the term "work" refers to the totality of tasks under the project and "... consists of four (4) **guaranteed** tasks as well as additional tasks which are **conditional** . . . upon availability of funds."<sup>28</sup>

42. That the listing of proposed personnel resources required by the solicitation documentation is in reference to the entirety of the work under the project supports the view that the word "resource(s)", in the RFP, including in the methodology prescribed for the calculation of average years of experience, is, in the absence of any indication to the contrary, to be interpreted in the wider sense of the term.

43. Finally, the Tribunal notes that the third column of the rated criteria table in Appendix "D" to the RFP (i.e. "Proposed Resource(s) Experience") refers to the amount of relevant experience (which is required for the application of the prescribed point-scoring scheme) rather than to the identity of the proposed resources themselves.

44. While the identification of each proposed resource with experience relevant to each rated criterion would certainly facilitate the evaluation team's verification of same, a plain reading of the rated criteria table in Appendix "D" to the RFP does not require it. The third column of the table, entitled "Proposed Resource(s) Experience", only required an indication of the total number of years of experience relevant to the criterion, possessed by the proposed resources comprising the bidder's project team. That the third column of the table was not broken out into separate columns—one for the identity of each of the proposed resources with relevant experience under the rated criterion and another for the years of experience—supports this interpretation.

---

27. GIR, tab C at 2.

28. *Ibid.* at 39.

45. Accipiter specifically alleged the following: “. . . **Evaluators decided unilaterally to ignore our proposed resource(s) for each criteri[on] as we EXPLICITLY offered in our Proposal . . . and instead . . . [effectively] amended our Proposal by adding our Entire Team as the de facto proposed resource(s) for every rated criteri[on].**”<sup>29</sup>

46. Accipiter further claimed that “. . . best value is achieved by assembling a Team where individual expert resources would be assigned to particular project tasks requiring their expertise . . . [and that] [t]he RFP recognizes this by defining several requirements and asking the Bidder to propose resource(s) against each.”<sup>30</sup>

47. However, in the Tribunal’s view, the issue is not the basis upon which Accipiter purported to offer its proposed resources for each criterion but whether the term “resource(s)” in the methodology specified in Appendix “D” to the RFP for calculating average years of experience, properly read, includes all the proposed resources comprising a bidder’s project team or only those individuals that the bidder chose to name under each rated criterion.

48. While the Tribunal appreciates the benefit of assigning particular individuals to specific tasks in respect of which they possess relevant expertise, one cannot conflate the knowledge/experience requirements delineated in the rated criteria in Appendix “D” to the RFP with the specific tasks described in the SOW, notwithstanding the obvious relationship between the two. Moreover, any such benefit would not, in and of itself, imply a right, on the part of a bidder, to decide which resources to have scored under each rated criterion, especially where such a right conflicts with the terms and conditions of the solicitation relating to bid evaluation.

49. In the Tribunal’s view, ascribing a narrow connotation to the term “resources”, as proposed by Accipiter, would lend itself to the prospect of “cherry-picking”, whereby bidders would be incentivized to strategically select and showcase one or a few individuals with a high point value under each rated criterion in an effort to win the contract, with no assurances as to the actual level of involvement of these particular individuals in contract performance. Averaging total relevant experience under a rated criterion across the entire project team (rather than only among a particular subset of project team members identified by a bidder) can help mitigate the obvious risks associated with such practices.

50. It is well established that a procurement authority can define its own solicitation requirements.<sup>31</sup> The procurement authority must then correctly interpret the scope of the requirements, as set out in its own solicitation documentation. Evaluators are not allowed to apply requirements that are not explicit in, or do not arise by necessary implication from, a proper contextual reading of the solicitation documentation.<sup>32</sup> In the case now before it, the Tribunal finds nothing in the language of the calculation methodology prescribed in Appendix “D” to the RFP for calculating proposed resources’ average years of experience to support Accipiter’s interpretation of same. Indeed, the provision clearly speaks in terms of the “total number” of resources.<sup>33</sup>

---

29. Comments on the GIR at 5.

30. *Ibid.* at 4.

31. *Re Complaint Filed by Forrest Green Resource Management Corp.* (12 August 2010), PR-2009-154 (CITT) at para. 44; *Re Complaint Filed by MTS Allstream Inc.* (5 August 2005), PR-2004-061 (CITT) at para. 67.

32. This can be viewed as the opposite side of the same coin that requires strict compliance on the part of bidders with the mandatory requirements of a solicitation. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT) at 6; *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT) at 6.

33. The Tribunal notes that, if there are ambiguous provisions in a document, the principle of *contra proferentem* applies. Under this principle, any ambiguous provisions would be construed as against the party that drafted the ambiguous provision. In this case, however, the Tribunal is of the view that the provisions are not ambiguous.

51. That Accipiter's interpretation is untenable is further evident from the fact that it could have been easily reflected with minor changes to the prescribed methodology:

Average years = Total number of years of experience of resource(s) proposed under a rated criterion ÷ Total number of resources proposed under that criterion (Underlining denotes changes that would have been required to current methodology)

52. Finally, concerning Accipiter's claim that the evaluation team should have availed itself of its RFP-reserved right to seek confirmation of the relevant experience, as outlined in its technical proposal, it is well established in Tribunal jurisprudence that responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation and that it accurately reflects the bidder's intention ultimately resides with the bidder.<sup>34</sup> While the Tribunal has in the past determined that government institutions had been prudent to seek clarification,<sup>35</sup> it has consistently refused to impose, on procuring authorities, an obligation to do so.<sup>36</sup>

53. In short, the Tribunal finds no basis upon which to conclude that the evaluators failed to properly apply rated criterion R1 in the evaluation of Accipiter's technical proposal.

### **Rated Criterion R2**

54. Rated criterion R2 reads as follows:

The proposed resource(s) \*average-years of previous relevant experience related to SAR polarization research.

55. DFO submitted that the evaluation team evaluated the proposed resources' average years of previous relevant experience with marine radars, radar theory, microwave theory, control theory, mechanics and programming. It submitted that it took into account the experience of the team in relation to synthetic aperture radar polarization research as it was submitted by Accipiter in its proposal. According to the evaluation results, Accipiter scored 10 points, which does not meet the 70percent requirement.

56. Accipiter made the same submission with respect to this criterion as for rated criterion R1.<sup>37</sup>

57. The Tribunal has carefully considered the evidence relating to rated criterion R2 and, following the same line of reasoning as for rated criterion R1, finds no basis upon which to conclude that the evaluators failed to properly apply rated criterion R2 in the evaluation of Accipiter's technical proposal.

### **Rated Criterion R3**

58. Rated criterion R3 reads as follows:

Points will be awarded for the proposed resource with demonstrated experience in the enhanced processing of marine radars.

---

34. *Re Complaint Filed by Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT); *Re Complaint Filed by Mircom Technologies Ltd.* (11 July 2006), PR-2006-004 (CITT) at para. 32; *Re Complaint Filed by RTG Protech Inc.* (4 June 2009), PR-2009-014 (CITT).

35. *Re Complaint Filed by Bell Canada* (21 February 1997), PR-96-023 (CITT).

36. *Re Complaint Filed by Marathon Watch Company Ltd.* (19 May 2010), PR-2010-011 (CITT) at para. 16; *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13; *Re Complaint Filed by IBM Canada Limited* (10 April 2003), PR-2002-040 (CITT).

37. Confidential GIR, tab I at 35.

59. The associated rating scale was as follows: basic experience = 5 points, fair experience = 10 points and extensive experience = 20 points. As noted by Accipiter, unlike under rated criteria R1 and R2, the scoring of proposals under this criterion did not require the determination of the specific number of years of experience of the individuals concerned.

60. Accipiter claimed that “. . . the Evaluation Team [gave it] only fair experience notwithstanding the fact that enhanced processing of marine radars has been [its] business for the last 16 years . . .”<sup>38</sup> It further claimed that this rating was based on the evaluators’ misunderstanding of marine radars and enhanced processing of marine radars.<sup>39</sup>

61. DFO indicated that the fair experience rating that resulted in the award of 10 points to Accipiter under this criterion was based on a careful and independent assessment of the résumés submitted by Accipiter as part of its technical proposal.<sup>40</sup> By way of justification for the score, it indicated as follows:

. . . while . . . the Complainant’s team has a lot of experience in surface, airborne and space-based radar systems for homeland security, missile detection, bird air strike hazards, unmanned aircraft, underwater targets, as well as smart antennas, anti-jamming radio communications and other technologies, it has less experience with the enhanced processing of marine radars. The total team has 27 less years working with enhanced processing of marine radars than with standard marine radars.<sup>41</sup>

62. The Tribunal is unable to conclude that the evaluation team’s assessment of Accipiter’s technical proposal under rated criterion R3 was unreasonable from a technical point of view. In previous decisions, the Tribunal has stated that it will not substitute its judgment for that of the evaluators unless the evaluators had not applied themselves in evaluating a bidder’s proposal, had ignored vital information provided in a bid, had wrongly interpreted the scope of a criterion, had based their evaluation on undisclosed criteria or had otherwise not conducted the evaluation in a procedurally fair way.<sup>42</sup>

63. The Tribunal does however note, as did Accipiter,<sup>43</sup> that the assessment only considered 11 of the 14 members comprising Accipiter’s project team, with no clear explanation given as to why the other 3 members of the team were disregarded.

64. In failing to consider the relevant experience of the entire Accipiter project team, as it did for rated criteria R1 and R2, the evaluators failed to conduct a proper assessment of Accipiter’s technical proposal under this rated criterion. The Tribunal notes however that this finding is of no practical consequence given the need under the RFP to satisfy the 70 percent requirement for each rated criterion and its findings that DFO was correct in its assessment of Accipiter’s proposal in respect of rated criteria R1 and R2.

#### **Rated Criterion R4**

65. Rated criterion R4 reads as follows:

Points will be awarded according to the depth, knowledge and experience of the company in project management skills and methodology.

---

38. Comments on the GIR at 5.

39. *Ibid.* at 6.

40. GIR, para. 38 at 16.

41. GIR, para. 37 at 16.

42. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

43. Comments on the GIR at 5-6.

66. DFO noted that Accipiter was awarded the maximum points (10) for this criterion.

67. The Tribunal notes that the evaluation of Accipiter's technical proposal under this criterion, for which it received full points, is not in issue in these proceedings.

### Rated Criterion R5

68. Rated criterion R5 reads as follows:<sup>44</sup>

Points will be awarded according to the depth of the proposal and methodology that clearly demonstrates knowledge of the project requirements and presents it in a clear and concise manner.

69. The associated rating scale was as follows: basic knowledge = 5 points, fair knowledge = 10 points and extensive knowledge = 20 points.

70. The Tribunal notes that Appendix "D" to the RFP includes the following statement: "It is imperative that these criteria be addressed *in sufficient depth* in the proposal to fully describe the Bidder's response and to permit the Evaluation Team to rate the proposals." [Emphasis added]

71. The SOW consists of 4 guaranteed tasks, as well as 7 conditional tasks which would be activated upon request by "the Minister" contingent upon the availability of funds. According to the SOW, the fourth guaranteed task will be the subject of a "**Go, No-Go decision**" by the project authority on whether or not to continue with the conditional tasks. The decision to proceed with each/all of the conditional tasks will be based on the availability of funding.<sup>45</sup> While acknowledging that Accipiter addressed all 11 tasks in its technical proposal, DFO, by way of justification for the "fair experience" rating that it gave to Accipiter (which resulted in the award of 10 points under the point-scoring scheme for this criterion), claimed as follows: "Many of the tasks were very similar to wording in the Statement of Work. *Additional details as to how the tasks would be completed [could have indicated] a deeper comprehension of the project requirements*, thus reducing . . . [s]uch risks [as] changes to the project scope, including delays, increased costs, etc."<sup>46</sup> [Emphasis added]

72. More specifically, with respect to Task 3 (i.e. cross-polarized signal interface design and development), which is considered a critical step in radar development, DFO submitted that it was not clear how Accipiter intended to combine the horizontal send/horizontal receive and horizontal send/vertical receive data from the two scanners for display on the radar monitor.<sup>47</sup> In particular, while describing how the master and slave radar units would be physically connected, it did not explain how the resulting data would be combined and displayed.<sup>48</sup>

73. With respect to Task 4 (i.e. real-time calibration algorithm and ice discrimination), DFO claimed that Accipiter's proposal, while referring to cross-polarized fused data, provided no elaboration as to how this fusion would be accomplished in real time, merely noting that the requirements would extend to the fully integrated Phase 2 of the ice hazard radar prototype.<sup>49</sup>

---

44. The Tribunal notes that the RFP repeats the notation "R4" but that, according to Addendum No. 3 to the RFP, the last row of the rated criteria should read "R5", not "R4".

45. GIR, tab C at 41.

46. GIR at 17, para. 46.

47. *Ibid.*, para. 47.

48. GIR at 18, para. 50.

49. *Ibid.*, para 51.



74. Finally, regarding conditional Task 6 (i.e. implementation of real-time processing and display, systems integration, validation and testing), under which all the components are to be assembled, DFO indicated that Accipiter's proposal only states that the master/slave hardware would be integrated with the graphical user interface and algorithms built, but it notes that the lack of details on how this would be accomplished did not provide confidence to the evaluators that Accipiter knew how the task would be successfully completed.<sup>50</sup>

75. According to DFO, "[t]he lack of elaboration in the bid suggests that the project requirements were not understood by the Complainant or [that] the Complainant did not take the time to clearly explain [its] methodology."<sup>51</sup> Because Accipiter's proposal did not, in the evaluation committee's view, provide sufficient details to indicate how it would meet the project objectives, it was given a "fair knowledge" rating worth 10 points under the prescribed point scale.<sup>52</sup>

76. Accipiter, in response, claimed as follows:

- (a) its proposed resources did all the prior work relating to the current procurement requirement;<sup>53</sup>
- (b) the SOW did not ask the bidder to provide designs and solutions so that they could be evaluated,<sup>54</sup> and
- (c) it had clearly and concisely described, in a manner consistent with the evaluation criteria and SOW, its technical proposal, methodology and knowledge of the project requirements.<sup>55</sup>

77. As to the approach taken for the scoring of proposals under rated criterion R5, DFO indicated that, "[i]n order to determine if the contractor clearly demonstrated knowledge of the project requirements and provided a comprehensive approach to meeting the project objectives, the Evaluation Committee assessed each individual task against the tasks described in the Statement of Work (SOW)."<sup>56</sup> Given the logical connection between rated criteria and tasks to be performed under the SOW, the Tribunal considers this approach reasonable.

78. Turning to Accipiter's first submission concerning prior work leading up to the current procurement requirement, it is well established in jurisprudence that the Tribunal will not consider facts extraneous to the actual procurement in issue.<sup>57</sup>

79. Regarding Accipiter's second and third submissions, the Tribunal agrees with its claim that bidders were not required under rated criterion R5 to provide designs/solutions in their proposals. Indeed, such an expectation would be illogical, as it would require a bidder to provide an *ex ante* explanation of the results of

---

50. *Ibid.*, para. 52.

51. *Ibid.*, para. 53.

52. *Ibid.*, para. 54.

53. Comments on the GIR at 8.

54. *Ibid.*

55. *Ibid.*

56. GIR, para. 44 at 17.

57. In *Re Complaint Filed by Winnipeg Audio-Visual Services Inc.* (27 May 2004), PR-2004-011 (CITT), the Tribunal stated that it would not consider claims concerning the actions of contracting entities with respect to previous procurements, as they were not the subject of the complaint. See, also, *Re Complaint Filed by Argair Aerospace Limited* (15 February 2010), PR-2009-060 (CITT) at para. 38.

design/development work yet to be undertaken. It is noteworthy in this regard that, in the SOW, each of the tasks cited by DFO in justification of its R5 scoring of Accipiter's proposal culminates in the presentation of the "results" of the work undertaken under that particular task, i.e.:

... A presentation indicating the results of the server design and development task shall constitute the **third project task**.

...

... A presentation and recommendations describing the results of the algorithm development ... will constitute the **fourth project task**.

...

... The **sixth project task** shall be demonstration of the system to the CCG Project Authority and other project participants as well as a report summarizing the results of the testing.<sup>58</sup>

80. That being said, the depth of a technical proposal and methodology, as an indicator of a bidder's knowledge of project requirements, can be determined from an assessment of the bidder's approach to, and identification of, the broader technical parameters (including potential issues and options) of an eventual solution, the design/development specifics of which would only emerge from actual performance of the task.

81. On the basis of its review of Accipiter's technical proposal, the Tribunal finds that, while Accipiter's description of its proposed approach was clear and concise, the evaluation team's assessment that it was short on key technical specifics appears to be borne out. In particular, the Tribunal notes the following:

- (a) with regard to Task 3, Accipiter's proposed methodology<sup>59</sup> did not provide any technical elaboration on specifics of cross-polarized signal integration;
- (b) with regard to Task 4, Accipiter provided no elaboration on options for the development and use of real-time algorithms to merge and display signals;<sup>60</sup> and
- (c) with regard to Task 6, the proposal does not provide any elaboration as to how the system integration would be completed.<sup>61</sup>

82. As already noted, the standard of review adhered to by the Tribunal in such inquiries accords a large measure of deference to evaluators. This deference is especially understandable in bid proposal evaluations involving a significant level of technical expertise.<sup>62</sup>

83. In this regard, as the reasons cited by the evaluation team in support of the "fair knowledge" rating and related point score given to Accipiter are, in the Tribunal's view, tenable and sufficient to support the conclusion reached, the Tribunal finds no basis to interfere in the scoring of Accipiter's proposal under rated criterion R5.

---

58. GIR, tab C at 41-42.

59. Confidential GIR, tab I at 47.

60. *Ibid.*

61. *Ibid.* at 48.

62. *Re Complaint Filed by Chamber of Shipping of British Columbia* (24 March 2010), PR-2009-069 (CITT) at para. 37.

**Conclusion**

84. In light of the foregoing, given that Accipiter's technical proposal failed to respond to rated criteria R1, R2 and R5 of Appendix "D" to the RFP and to the 70 percent requirement, the Tribunal finds that the complaint is not valid.

**Costs**

85. DFO did not request costs.

**DETERMINATION OF THE TRIBUNAL**

86. 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