

Ottawa, Tuesday, June 3, 1997

File No.: PR-96-036

IN THE MATTER OF a complaint filed by Mirtech International Security Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Lyle M. Russell

Lyle M. Russell
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: June 3, 1997

Tribunal Member: Lyle M. Russell

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: John L. Syme

Complainant: Mirtech International Security Inc.

Government Institution: Department of Public Works and Government Services

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FINDINGS OF THE TRIBUNAL

INTRODUCTION

On March 11, 1997, Mirtech International Security Inc. (Mirtech) filed a complaint under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Solicitation No. TPD 19PW1-6-C010/000/A) by the Department of Public Works and Government Services (the Department) for the supply, installation and maintenance of an integrated security system for the Justice Headquarters Consolidation Project in the East Memorial Building and St. Andrew's Tower.

Mirtech alleged that its proposal was unjustly declared non-compliant with the specifications and that a contract had been awarded to Marcomm Fibre Optics Inc. (Marcomm) at a price considerably higher than its own price. Mirtech alleged, on the basis of the information that it received, that its proposal was turned down because it was not located in the Ottawa, Ontario, region and because it was not personally acquainted with the security consultant, of JSI Systems Engineering Division (JSI), who was not familiar with the system proposed by Mirtech.

Mirtech requested, as a remedy, that it be awarded the contract as the low qualified compliant bidder.

INQUIRY

On March 12, 1997, the Canadian International Trade Tribunal (the Tribunal) determined that the conditions for inquiry set forth in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² (the Regulations) had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into this matter.

On April 9, 1997, the Department filed with the Tribunal a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On April 28, 1997, Mirtech

1. R.S.C. 1985, c. 47 (4th Supp.).

2. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

3. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

filed its comments on the GIR with the Tribunal. On May 6, 1997, the Department filed additional comments with the Tribunal. Mirtech also provided additional comments on May 20, 1997.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on file.

PROCUREMENT PROCESS

A two-envelope system of tender review was instituted for this procurement. The bidders' proposals in response to the technical and project management requirements were to be contained in envelope "A" and their price proposals and completed tender forms were to be contained in envelope "B." The contents of envelope "A" would be evaluated first, and only the bidders with compliant technical and project management proposals would have their price envelope "B" opened to determine the successful bidder. In this particular instance, in order to be compliant, a proposal had to achieve a minimum score of 35 out of 50 points in both the technical and project management categories.

In the original solicitation documents, the "Special Instructions to Tenderers" (SIT) provided at article 6.1.2 that:

[t]he company shall have successfully completed a minimum of three (3) projects integrating access control, alarm monitoring, closed circuit television and voice communications with a final contract amount in excess of \$300,000, not including conduit and raceways, during the last five (5) years. At least one of these projects shall have been completed in the last three (3) years.

On November 22, 1996, Marcomm wrote to the Department requesting information on the rationale behind article 6.1.2 and alleging that, if it were not amended, it would unfairly preclude small companies, such as itself, from responding to the tender. As a result, during the period from November 22 to December 3, 1996, the provisions of article 6.1.2 were discussed extensively within the Department by a number of officials at various levels of responsibility. A new approach was proposed which, according to the Department, protected the Crown's interest while reducing the qualification barrier to the lowest reasonable level consistent with the scale and complexity of the project. On December 18, 1996, the Department issued Addendum No. 5 to the solicitation documents amending article 6.1.2 of the SIT as follows:

1. Reference Special Instructions to Tenderers

.1 Revise 6 BIDDER QUALIFICATIONS, 6.1.2 to read:

- .1 The company shall have successfully completed a minimum of three (3) security related projects with a final contract amount in excess of \$250,000, not including conduit and raceways, during the last five (5) years. In addition, or as one of the above three mentioned projects, the company shall have successfully completed one (1) project integrating access control, alarm monitoring, closed circuit television and voice communications with a final contract amount in excess of \$100,000, not including conduit and raceways, during the last three (3) years.

According to the Department, the first element of the restructured bidder's qualification requirements ensured that bidders would have adequate financial and managerial strength for this scale of project. The second element addressed the need to ensure that the firm selected for award would be able to

deliver an integrated security system. It was estimated by the Department that this approach could accommodate Marcomm, as well as an unidentified number of additional bidders.

In addition, the SIT provided, in part, at article 9.1 that, “[i]n cases where the level of compliance with the requirements is unclear from the Bidder’s response, the most restrictive interpretation will be assumed without requesting additional information and clarification from the Bidder.”

Eight bids were received at 2:00 p.m. on January 14, 1997, including one from Mirtech. The Contracting Officer and the Deputy Project Manager verified that all bidders had submitted both envelopes. Envelope “A” from each bidder was sent to the four technical reviewers on the Security Tender Review Committee (the Review Committee).

The Review Committee was comprised of six members, with three voting technical members as follows: the JSI consultant, the Department’s Maintenance Contracting and Commissioning Representative and the Construction Manager Systems Engineer for the Justice Headquarters Consolidation Project. The Review Committee also included three non-voting members: the Department of Justice representative, a policy advisor of the Security Systems Branch of the Royal Canadian Mounted Police; the Deputy Project Manager for the Justice Headquarters Consolidation Project, from the Department’s Parliament Precinct Directorate; and the Department’s Contracting Officer. According to the Department, the three voting members and the Department of Justice representative have in-depth experience and knowledge of security systems.

According to the GIR, the voting members of the Review Committee evaluated the proposals individually. Prior to the first evaluation meeting, the JSI consultant was directed by the Review Committee to ask questions to bidders for clarification purposes only. No new information was to be submitted. On January 23, 1997, the voting technical reviewers presented their score sheets to the Review Committee. Two bidders were deemed compliant, including Marcomm, with a technical score and a project management score in excess of the 35 out of 50 applicable pass mark. Price envelopes “B” from these two firms were then opened, and Marcomm at \$456,726 was the lowest of the two. On January 27, 1997, the results of the evaluation process were reviewed by the Deputy Project Manager and the Manager of Tenders and Contracts, as provided for under the two-envelope system. As a result, clarifications were sought from a third bidder which resulted in that bidder also qualifying for price consideration. However, Marcomm remained the lowest of the three compliant bidders.

On February 19, 1997, the Department informed the unsuccessful bidders of the results of the competition and, on February 20, 1997, it sent a letter of award to Marcomm accepting its tender. On or about February 25, 1997, a Mirtech representative spoke with the Contracting Officer who read to the representative the summary of the reasons supporting Mirtech’s disqualification as recorded in the “Minutes of Security Tender Review Meetings Nos. 1 & 2 January 23 & 30, 1997.” The Contracting Officer also suggested that Mirtech talk to the JSI consultant if a more technical debriefing was required. A formal debriefing session was also offered to Mirtech. On or about March 4, 1997, the JSI consultant called Mirtech to offer an explanation of the evaluation of its proposal. This conversation forms the basis of Mirtech’s disagreement with the technical evaluation. (The Tribunal notes that JSI takes exception to some of the comments attributed to it by Mirtech.)

VALIDITY OF THE COMPLAINT

Mirtech's Position

Mirtech objects to losing all or some of the evaluation points for the reasons listed below:

ITEM	RATING POINTS LOST
Lack of information on administrative operation of access system	4.5 out of 8.0
Unclear indications on how to handle Arm/Disarm	1.7 out of 10.0
Some equipment mentioned in cut sheets is not mentioned in block diagram	1.5 out of 10.0
Multiplexer proposed does not have front panel controls	1.0 out of 2.0
Proposed pan and tilt unit does not meet specifications	1.0 out of 2.0
Lack of local personnel in the Ottawa region	7.0 out of 10.0
Lack of evidence to support the qualifications of resource proposed	7.0 out of 10.0
No project team was specified	1.7 out of 5.0

Mirtech's position is that its proposal was unjustly declared non-compliant with the specifications and that the contract was awarded at a price considerably higher than its own price. Mirtech submits that, because it is not located in the Ottawa region, the JSI consultant was not personally acquainted with Mirtech or the system that it proposed and that this fact operated to its detriment.

Mirtech submits that, though the onus was on it, and other bidders, to provide evidence through its proposal that its system complied with the specifications, the JSI consultant did elect to question other bidders in detail regarding their proposals, thus allowing them to "fill in" any areas where their proposals might be unclear. However, the JSI consultant only sought limited clarifications from Mirtech and, thus, it was not afforded a similar opportunity. Mirtech submits that it did not realize that the JSI consultant would "disbelieve" its statement of compliance and that, had it been asked, it would have explained, for example, its intention to fully train electricians to be qualified service persons during the approximately eight months required to install the security system.

Mirtech questions the appropriateness of the two-envelope system of tender review for this particular project because it is time-consuming and precludes discussions with the lowest bidder. It notes that the JSI consultant recommended both the two-envelope system and the lowering of the bidder's qualification standard. Mirtech submits that these facts are not insignificant. Mirtech submits that, during the tender period, the bidder's qualification standard was lowered by a factor of nine. In its opinion, for an independent arms-length security consultant to recommend such a lowering of the qualification standard in respect of a security-sensitive project is "absolutely astounding." Further, considering that the company, Marcomm, which needed to have the standard lowered in order to qualify is also the one that was ultimately awarded the

contract, questions exist with respect to the relationship that might exist between the JSI consultant and Marcomm.

Discussing the specific areas in its proposal where it lost evaluation points, Mirtech submits that: (1) it should not have lost 1.5 points for failure to show the control unit and keypad on the block diagrams, since the diagrams were only required to show the major system components, and the control unit and keypad are just sub-components; (2) the pan and tilt unit for which Mirtech was marked down one point was, according to the Department's own admission, acceptable and it is interesting to note that the zoom lens item for which Mirtech is now losing one point came into play after it was discovered that the pan and tilt unit was correct and after the contract was awarded; (3) no point should have been lost for service call response time, since Mirtech clearly indicated service would be done by a firm based in Ottawa; (4) an inordinate amount of points (7.0) were taken off in respect of project management; in fact, given the contents of the proposal, Mirtech submits, half that amount was enough; (5) contrary to the Department's assertions, an organization chart showing the on-site workers, but not specifying the quantity of site personnel, was provided; (6) no points should have been lost apparently because Mirtech is a Canadian manufacturer; and, finally (7) Mirtech probably being the leading company in Canada in terms of prior experience and previous performance, no points should have been lost in that respect.

In sum, Mirtech submits that it has conclusively demonstrated that its proposal was technically compliant if only for the 0.7 point that it lost for stating that it is a manufacturer, which it is. Indeed, the 0.7 point when added to its score of 31.3 gives Mirtech's proposal a score of 32.0 out of 46.0 or a weighted total of 35.0 out of 50.0, which is the passing score. With respect to project management, Mirtech submits that losing 7.0 points out of 10.0 for occasional lateness on a service call is wildly excessive, particularly given that the service personnel in Ottawa, judged by the Department not to be qualified, would certainly, at least, be on time. In addition, the 3.0 points taken off for curriculum vitae is totally improper in the circumstances. Together, in Mirtech's opinion, the above items, properly evaluated, should raise its score well above the passing mark for project management.

Department's Position

The Department submits that Mirtech was eliminated from the evaluation process because it failed to satisfy both the technical and project management requirements. Indeed, Mirtech achieved scores of 34.1 for technical compliance and 32.7 for management compliance, whereas a minimum score of 35 points was required in both categories for a proposal to be considered compliant. These scores, the Department notes, represent the average of the three scores assigned by the voting members of the Review Committee and also represent a consensus, as none of the members gave a pass score to Mirtech in either category.

The Department submits that the members of the Review Committee were selected by the Department's Real Property Contracting Services in consultation with the Deputy Project Manager for the Justice Headquarters Consolidation Project. The Review Committee was broadly formed of six persons representing designer, tenant, owner/operator, project and construction management and contracting authority. The Department stresses that the three voting members of the Review Committee were experienced and knowledgeable with respect to the type of security system to be procured and installed.

Moreover, the Department submits that each bidder's proposal was evaluated and scored on the basis of its submission alone. Familiarity with the bidder's proposed security system was not a factor in this

process. In this context, the Department emphasizes that the onus was on each of the bidders to provide evidence through its proposal that its system complied with the specifications.

Concerning the project management portion of the specifications, the Department submits that the requirement that bidders provide a guaranteed response time of 4 hours, 24 hours per day, 7 days per week, to all service requests is not a geographical prejudice. It is a mandatory functional requirement of this project, as dictated by the needs of the Department of Justice. The Department submits that Mirtech failed to present evidence that the local maintenance representative which it proposed, who is a general electrical contractor, has the necessary experience or, alternatively, how he was to be trained in the proposed security system in order to meet the requirements of the specifications.

After stating that it did not seek new information during the clarification questions and that the evaluation scores were based on the contents of the proposals only, the Department submits, in respect of the eight specific technical grounds of complaint raised by Mirtech, that Mirtech's proposal: (1) lacked information on the administrative operational features; (2) failed to describe completely the system proposed; (3) could not be evaluated for elements not properly identified on its block diagram, nor receive full marks in respect of the equipment proposed in the data sheets since that equipment is typically utilized in domestic and small commercial applications rather than larger sophisticated commercial systems; (4) proposed a multiplexer that does not meet the specifications for front panel controls; (5) although satisfactory in respect of the pan and tilt camera unit, failed nevertheless to meet the specifications with respect to the zoom lens requirement; (6) failed to indicate the presence of an office from which qualified service personnel could be dispatched, other than in Concord, Ontario, from which response time would be unacceptable; (7) failed to document that the local personnel proposed to provide initial service response had any prior experience with or had received any training on the security system proposed; and (8) failed to provide a project organization chart indicating, among other things, the quantity of site personnel or the location and quantity of staff available for maintenance and servicing.

Concerning the possibility of the existence of a special relationship between the JSI consultant and Marcomm, the Department indicates that JSI stated categorically that it has "never had any business, financial or personal relationship with Marcomm or any of their principals. The only relationship was one of consultant to Correctional Services Canada on a small ... project at the LeClerc Institution in 1993 for which Marcomm was the contractor."

Tribunal's Decision

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. 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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the *Agreement on Internal Trade*⁴ (the AIT). In deciding these matters, the Tribunal must determine whether the Department, in conducting this procurement, acted according to the provisions of the AIT. Specifically, the Tribunal must decide whether the Department, in evaluating Mirtech's proposal, applied the evaluation criteria set out in the Request for Proposal (RFP) and whether it applied these in a manner consistent with the AIT.

4. As signed at Ottawa, Ontario, on July 18, 1994.

It is agreed that the two-envelope system of tender review was initially recommended by the JSI consultant. The approach was clearly set out in the RFP and was known or should reasonably have been known to Mirtech from the time of the release of the solicitation documents to the time that its bid was rejected. Mirtech neither objected to this approach nor questioned the influence of the JSI consultant in proposing its use. The Tribunal is satisfied that it was well within the responsibility of the JSI consultant and proper in the circumstances to make such a recommendation. In the end, the Department, not the JSI consultant, approved the recommendation and included the approach in the RFP. Accordingly, the Tribunal is satisfied that the JSI consultant did not exercise undue influence in this matter. Moreover, given the sensitivity of the information housed at the Department of Justice's headquarters, the Tribunal does not consider this two-envelope approach, with its emphasis on technical compliance rather than purely on price, to be unreasonable.

Concerning the question of the bidder's qualification standard in the RFP, the Tribunal notes that the matter was first raised by Marcomm in its letter of November 22, 1996, to the Department. Indeed, Marcomm considered the qualification standard, as set in the original RFP, to be overly demanding in the circumstances and, thus, served only to limit competition. The Department reviewed Marcomm's representation in this respect. Having established that Marcomm had previously performed services for the Department and having also confirmed that Marcomm had, at least once, been disqualified from bidding as a consequence of a qualification standard similar to the one first proposed in this case, the Department decided to revise the qualification standard. In this respect, the Tribunal notes that, though consulted with respect to this issue, the JSI consultant played only a marginal role in the alteration of the standard. Accordingly, in the Tribunal's opinion, there is simply no foundation in fact to support the allegation that the JSI consultant played an improper role or exercised undue influence in having the qualification standard altered. In fact, Mirtech recognizes that the Department has the authority to set reasonable qualification criteria and, in the Tribunal's opinion, that is precisely what the Department did.

Mirtech has also represented that the JSI consultant chose to adopt an evaluation approach in which it asked few questions with respect to bidders' proposals. In Mirtech's view, this approach provided an advantage to bidders with whose systems the JSI consultant was familiar. Conversely, that approach worked to Mirtech's detriment. Moreover, Mirtech submits that the JSI consultant did ask certain bidders questions. The Tribunal is of the view that the approach to clarification is not the personal approach of the JSI consultant, but rather is the approach set out by the Department in article 9.1 of the SIT which applied to all bidders. Further, at the request of the Review Committee, the JSI consultant sought certain clarifications from Mirtech, as well as from the leading bidders. Therefore, the Tribunal is satisfied that Mirtech was treated in this matter like all other bidders.

In the Tribunal's opinion, the JSI consultant, acting as one of three voting members of the Review Committee comprised of six qualified and experienced individuals, performed the duties and responsibilities of his role fairly and without exercising undue influence. In the Tribunal's opinion, the JSI consultant's approach in reviewing and marking all bids was constant and consistent. Moreover, in the Tribunal's opinion, there is no evidence whatsoever to support any allegation of an improper relationship between the JSI consultant and Marcomm.

Concerning the technical evaluation, the Tribunal is satisfied that the Review Committee conducted a thorough review of Mirtech's proposal. In so doing, the Review Committee applied the evaluation method set out in the RFP consistently, and it documented its decisions and findings in a satisfactory manner. On the

precise question as to whether or not Mirtech should have received more points on the eight specific items mentioned earlier, the Tribunal is of the view that, if it is satisfied that the Department acted in a procedurally fair manner, it must defer to the Department's judgment on those specific items.

In this instance, the Tribunal is satisfied that the Department set out in the RFP a clear evaluation approach and criteria that it organized properly for the conduct of the evaluation of proposals, including the formation of a broadly based Review Committee of experienced individuals in security systems, as well as in the management of the procurement process. The Tribunal is also satisfied that the Review Committee conducted the evaluation of all proposals thoroughly, consistently and in accordance with the provisions of the RFP and that it has documented its actions, thereby allowing for independent third-party review. In respect of the eight specific items in Mirtech's complaint, the Tribunal is satisfied that the Review Committee applied its mind to these items and that it judged these within the parameters of the evaluation framework, i.e. on the basis of the contents of the proposals and within the point rating scheme designed to that end. The Tribunal is also satisfied that Mirtech was not discriminated against on the basis that it is not located within the Ottawa region. It is clear that Mirtech's proposal was marked down in respect of ongoing service and maintenance requirements because of the particular service arrangements that it proposed. The Tribunal is satisfied that these ratings reflect the Department's judgment of Mirtech's ability, as documented in its proposal, to satisfy stringent service requirements and that these ratings do not imply a geographical bias on the part of the Department.

For the reasons stated above, the Tribunal finds that the Department properly declared Mirtech's proposal non-compliant with the specifications for failing to meet the mandatory pass marks for technical merit and project management. The Department arrived at this decision fairly, equitably and transparently and used, in so doing, criteria and weighting that were clearly set out in the tender documents.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was conducted in accordance with the AIT and, therefore, that the complaint is not valid.

Lyle M. Russell

Lyle M. Russell
Member