

Ottawa, Tuesday, July 20, 1999

File No.: PR-99-007

IN THE MATTER OF a complaint filed by IT/NET Consultants 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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Correctional Service of Canada re-evaluate the four proposals that it received in response to the solicitation. This re-evaluation should be performed using the version of mandatory requirement 8.1.1.1c) modified on February 22, 1999. In the event that IT/NET Consultants Inc. is declared the successful bidder by the Correctional Service of Canada in accordance with the evaluation and award provisions set out in the solicitation documents as amended, the Canadian International Trade Tribunal further recommends that the contract awarded to Deloitte & Touche Consulting Group be terminated and, instead, be awarded to IT/NET Consultants Inc.

In the alternative, the Canadian International Trade Tribunal recommends that the Correctional Service of Canada present to the Canadian International Trade Tribunal a proposal for compensation, developed jointly with IT/NET Consultants Inc., that recognizes the profit that it lost in being deprived of the contract.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards IT/NET Consultants Inc. its reasonable costs incurred in relation to filing and proceeding with the complaint.

Pierre Gosselin

Pierre Gosselin

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: July 20, 1999

Tribunal Member: Pierre Gosselin

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Marie-France Dagenais

Complainant: IT/NET Consultants Inc.

Counsel for the Complainant: David M. Attwater

Government Institution: Correctional Service of Canada

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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*.

STATEMENT OF REASONS

COMPLAINT

On April 21, 1999, IT/NET Consultants Inc. (IT/NET) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act) concerning the procurement (Request for Proposal No. 21150-9-7500) by the Correctional Service of Canada (CSC) for the provision of development and maintenance services for the CSC's PeopleSoft human resource management system (HRMS). The proposed contract was for a two-year period from April 1, 1999, to March 31, 2001, with an option for an additional one-year period.

IT/NET alleged that, contrary to the provisions of the *North American Free Trade Agreement*² (NAFTA), the *Agreement on Government Procurement*³ (the AGP) and the *Agreement on Internal Trade*⁴ (the AIT), the CSC used, in the conduct of this procurement, evaluation criteria that were ambiguous, that it interpreted and applied the criteria set out in the Request for Proposal (RFP) in a manner which imposed restrictions on potential suppliers, thereby discriminating against IT/NET, and that it failed to award the contract in accordance with the criteria set out in the RFP.

IT/NET requested, as a remedy, that the designated contract be terminated, that IT/NET's proposal be re-evaluated in accordance with the trade agreements and that the contract be awarded to the lowest compliant bidder. In the alternative, IT/NET requested that a new solicitation for the designated contract be issued or that it be compensated by an amount equal to its total anticipated profits under the contract. IT/NET also requested its bid preparation costs and its complaint costs.

On April 29, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁵ (the Regulations). On June 11, 1999, the CSC filed a Government

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

2. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

3. As signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

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

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

Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶ IT/NET filed its comments on the GIR with the Tribunal on June 23, 1999.

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 the record.

PROCUREMENT PROCESS

On February 5, 1999, a Notice of Proposed Procurement for the requirement was posted on Canada's Electronic Tendering Service (MERX) and was advertised in *Government Business Opportunities*. The requirement was identified as being covered by NAFTA and the AIT. The RFP reads, in part, as follows:

5.2 Contracting Authority

All questions concerning this RFP are to be directed to the Contracting Authority named above.

8.1.1 Proposed Services & Personnel

Mandatory Requirements

8.1.1.1 The Firm

- c) It must be demonstrated that the firm retains certification by PeopleSoft as an Implementation Partner.

Section 8.1.2 of the RFP, "Requirements Subject to Point Rating", indicated that proposals must achieve a minimum of 75 points for the following rated requirements:

- a) **Understanding the Project** (Weighted Value - 10%)
- b) **Personnel** (Weighted Value - 80%)
- c) **The Firm** (Weighted Value - 10%).

8.1.4 Compliance Check List

It is understood by the parties submitting proposals that to qualify, the contractor must (a) meet all the mandatory conditions of this RFP. . .

Proposals not meeting (a) and (b) above will be given no further consideration.

On February 16, 1999, a telephone conversation took place between the CSC and IT/NET concerning mandatory requirement 8.1.1.1c) of the RFP. On February 19, 1999, IT/NET sent an e-mail to the CSC requesting a response, in writing, to a question that it raised during the February 16, 1999, telephone conversation with the CSC concerning this solicitation. On February 22, 1999, the CSC responded by e-mail, as follows:

The intent [of] Article 8.1.1.1c) is to ensure that any firm submitting a proposal demonstrate a formal association/certification with/by Peoplesoft as an authorized dealer, reseller, consulting services partner or what have you.

The nature of the association may be confirmed by the [CSC].

Four proposals, including one from IT/NET, were received by the bid closing date on March 22, 1999.

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

The technical proposals were evaluated on March 30, 1999. That same day, the CSC sent a facsimile to PeopleSoft Canada Company, which reads, in part, as follows:

We had posted that the firms applying to the Request for Proposal had to be certified as being an Implementation Partner by PeopleSoft.

Could you please confirm to me in writing if the following four (4) firms are certified by PeopleSoft as Implementation Partners.

On March 31, 1999, PeopleSoft responded by indicating that IT/NET was not a PeopleSoft certified implementation partner. It added that IT/NET participates in the PeopleSoft Contract Service Providers Program, which means that IT/NET does work occasionally with PeopleSoft's own professional services organization on a sub-contract basis and has access to PeopleSoft training programs.

On April 7, 1999, the CSC advised Deloitte & Touche Consulting Group, one of the four bidders, that its proposal had been accepted. That same day, the CSC advised IT/NET that its proposal had failed to meet mandatory requirement 8.1.1.1c) of the RFP.

On April 12, 1999, the CSC received a letter from IT/NET voicing its disagreement with the CSC's decision. The CSC responded to IT/NET by facsimile dated April 20, 1999, in part, as follows:

We would first like to address the misunderstanding that may have been created with regard to Mandatory Requirement 8.1.1.1c) which required that firm retains certification by PeopleSoft as an Implementation Partner and the facsimile message related to it.

In the explanation that [the CSC] gave to a representative of your firm, the purpose [of the] requirement was to ensure that a formal agreement, identified in the RFP as being an Implementation Partner, existed between the firm and PeopleSoft.

In order to allow for any other formal agreement which might be deemed equivalent to that of an Implementation Partner, the facsimile message sent to you on this matter, the use of "The intent of Articles 8.1.1.1c) is to ensure a formal association/certification with/by PeopleSoft as an authorized dealer, reseller, consulting services partner or what have you" was provided to allow for such . . . an equivalent status regardless of terminology.

It would be incumbent upon the firm to demonstrate the equivalency and that the association could be confirmed with PeopleSoft.

To confirm that the mandatory requirement would stand the message went on to state that "Given the above no amendment will be issued".

We believe that this mandatory requirement was valid and non-restrictive.

VALIDITY OF THE COMPLAINT

CSC's Position

With respect to IT/NET's allegations that (a) contrary to Article 506(6) of the AIT, Article 1009(2)(b) of NAFTA and Article VIII(b) of the AGP, mandatory requirement 8.1.1.1c) of the RFP imposes a qualification in excess of what is essential to fulfil the subject contract and (b) contrary to Article 506(6) of the AIT, Article 1013(1)(h) of NAFTA and Article XII(2)(h) of the AGP, the evaluation criteria under section 8.1.2 of the RFP, "Requirements Subject to Point Rating", was ambiguous, the CSC submitted that, although IT/NET had been aware of these grounds of complaint since February 5, 1999, the date on which it ordered the RFP from MERX, it never objected to this requirement and criteria and that, therefore, it is now too late to complain about these grounds.

The CSC submitted that the objection filed by IT/NET dated April 11, 1999, relates only to the CSC's clarification of the "meaning" of mandatory requirement 8.1.1.1c) and did not make any reference to the requirement being in excess of what was required, nor did it make any reference to the evaluation criteria being ambiguous.

In the alternative, the CSC submitted that it did not employ restrictive conditions in the RFP, because the requirement that the supplier be a certified "PeopleSoft Implementation Partner" is a qualification essential to fulfil the contract. The CSC argued that it has used implementation partners since 1996 and that, given the uniqueness, size and complexity of its requirement, it was entitled to demand, as a mandatory requirement, that suppliers have certification by PeopleSoft of being an implementation partner.

With respect to the fact that the CSC did not require implementation partner certification in its 1995 and 1996 RFPs, the CSC submitted that its orientation, at the time, was to implement the PeopleSoft HRMS product without customizing it. Accordingly, in this context, it was felt that a service provider could perform the work.

With respect to the alleged ambiguity of certain evaluation criteria, specifically the rated requirements, the CSC submitted that, based on the list of sub-criteria and the weighted value of 80 percent for proposed personnel's experience and knowledge, IT/NET had sufficient information to provide a responsive tender. The CSC argued that the point rating mechanism used in the RFP is standard practice and that the CSC never received any objection nor demands for clarification on this point. The CSC submitted that, although the percentage points to be awarded for each sub-criteria were not advertised in the RFP, these points were predetermined and would have been available to IT/NET if it had requested the information.

With respect to IT/NET's letter of February 10, 1999, the CSC asserted that it never received this letter. The CSC submitted that the contracting authority recalls that his response to IT/NET's query of February 16, 1999, over the telephone, was identical to prior correspondence and a discussion that it had had with another supplier that had requested that mandatory requirement 8.1.1.1c) be changed to include PeopleSoft consulting services partners, which request was denied.

The CSC submitted that its communication of February 22, 1999, used the terms "authorized dealer, reseller, consulting services partner" only to demonstrate some standard terminology used to describe formal or authorized relationships between firms and not to imply that any or all such relationships would be deemed equivalent to being an implementation partner. The intent of the explanation, the CSC submitted, was never to amend the mandatory requirement that the supplier have implementation partner certification. The CSC argued that IT/NET erroneously interpreted the clarification, which was meant as a confirmation of the conversation of February 16, 1999. In addition, the CSC clearly expressed its intention of verifying the relationship with PeopleSoft and expressly stated that the mandatory requirement would not change. No amendments to the RFP were ever advertised, and the CSC submitted that it would not amend the requirements for one supplier only.

Furthermore, the CSC submitted that IT/NET is aware or should have been aware of the certification process of PeopleSoft (as it has obtained certification as a service provider) and knew or should have known the difference between certification for service provider and certification for implementation partner.

The CSC submitted that, because requirement 8.1.1.1c) of the RFP was a mandatory requirement, it was correct in disqualifying IT/NET's proposal and in awarding the contract as it did.

IT/NET's Position

IT/NET submitted that the allegation that the RFP employed restrictive conditions is timely because it objected on April 12, 1999, to the CSC's interpretation of mandatory requirement 8.1.1.1c) as clarified and that, therefore, this ground of complaint was filed on time. IT/NET submitted that it promptly sought an explanation of the CSC's use of the technical qualification "PeopleSoft Implementation Partner", that it had the right to rely on the clarification provided by the CSC and that it is inappropriate for the CSC to give clarifications of a mandatory requirement on which a potential supplier can reasonably rely and then to revise or abandon those clarifications at the time of qualifying potential suppliers and, on this basis, to submit that a potential supplier should have objected earlier to the condition. IT/NET did not pursue the matter at the time because it found the CSC's clarifications satisfactory.

With respect to its allegation that the contract was not awarded according to the evaluation criteria in the RFP, IT/NET argued that the CSC never stated that this technical qualification would not change. The CSC has accepted, as a general principle, that clarifications provided by the contracting authority form part of the criteria and essential requirements in the tender documents. However, IT/NET added, the CSC argues that "[n]o amendments to the procurement process were ever advertised" and, therefore, the CSC did not alter the mandatory requirement in dispute.

IT/NET submitted that whether or not the clarification provided by the CSC was "advertised" is not determinative of whether it became part of the criteria specified in the RFP. IT/NET argued that it could reasonably rely on the CSC's clarification because: (a) the clarification was provided in response to a legitimate request for clarification; (b) it received both a verbal and an e-mail response to the same effect; (c) the clarification was provided by the contracting authority identified in the RFP as the person to whom all questions must be directed; (d) the clarification was required pursuant to the trade agreements; (e) it was provided in a manner consistent with the trade agreements; (f) it was apparently provided to other potential suppliers; and (g) it was provided in a manner consistent with an earlier experience by IT/NET.

Furthermore, IT/NET argued that the CSC's assertion that it made no amendment to mandatory requirement 8.1.1.1c) of the RFP is unsubstantiated and rests on self-serving, unsupported and inconsistent evidence.

With respect to the use of restrictive conditions in the RFP, IT/NET submitted that the CSC has breached the trade agreements by imposing on potential suppliers conditions greater than necessary to ensure the fulfilment of the contract. Furthermore, IT/NET submitted that, because it is capable of fulfilling the contract, the imposition, interpretation or application of mandatory requirement 8.1.1.1c) had the effect of discriminating against IT/NET. While the CSC has argued vigorously that an implementation partner has the skills necessary to ensure fulfilment of the contract, IT/NET submitted that the CSC has not indicated why a contract service provider or more particularly IT/NET, with its specific knowledge, skills and experience, could not fulfil the contract and, therefore, not qualify under the RFP. Specifically, IT/NET argued that, contrary to the CSC's assertion, an implementation partner and a service alliance partner are one and the same. A PeopleSoft implementation partner status, IT/NET submitted, is actually a marketing status, not a certification level guaranteeing skills that another consulting company, without such status or with a different level of certification, would not possess.

IT/NET submitted that the program description of "service alliance" relied on by the CSC in submitting that it required a PeopleSoft implementation partner includes the program under which IT/NET is certified, the Contract Service Providers Program. In addition, IT/NET submitted that it has fully

implemented many change control mechanisms for its clients and that several departments, other than the CSC, have built “bolt-on” modules and enhancements that will never be incorporated in the standard Government of Canada version of PeopleSoft HRMS.

On the question of the requirement to be a PeopleSoft implementation partner or, as clarified, an equivalent, IT/NET submitted that the technical qualifications should be specified in terms of particular knowledge, skills or experience and not refer to company-specific certifications.

With respect to the evaluation criteria in the RFP, IT/NET argued that, by not informing potential suppliers of the relative importance of each sub-criteria and how evaluation points would be awarded for “personnel”, the CSC has undermined the objective of transparency in the tender process and has incorporated significant subjective elements into the evaluation of proposals. It should not be necessary, IT/NET submitted, to request such information, particularly in a case such as this one where the information apparently was readily available.

TRIBUNAL’S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with NAFTA, the AGP and the AIT.

IT/NET alleged that, contrary to the provisions of Article 506(6) of the AIT, Article 1013(1)(h) of NAFTA and Article XII(2)(h) of the AGP, the CSC published ambiguous evaluation criteria in the RFP. Specifically, IT/NET submitted that the point rating scheme in the RFP, particularly with respect to “personnel” requirements, was not sufficiently detailed to permit suppliers to submit responsive bids.

Section 6 of the Regulations sets out the time frames in which potential suppliers must make an objection to a government institution and/or file a complaint with the Tribunal. Generally, potential suppliers are required to make their objections and/or to file their complaints within 10 working days from when the basis of the complaint became known or reasonably should have become known. The RFP for this solicitation was published on February 5, 1999. In the Tribunal’s opinion, since the proposal’s point rating scheme was clearly set out in the RFP, IT/NET should have complained to the Tribunal or should have made an objection to the CSC within 10 working days of February 5, 1999, in order for this ground of complaint to meet the prescribed time frames. This was not done and, therefore, the Tribunal will not address this ground of complaint on its merits.

With respect to IT/NET’s allegation that the CSC interpreted and applied mandatory requirement 8.1.1.1c) of the RFP in a restrictive, discriminatory manner and, on this basis, may have improperly awarded the contract to Deloitte & Touche Consulting Group, the Tribunal finds that this ground of complaint is valid.

The Tribunal notes that the CSC amended the terms of mandatory requirement 8.1.1.1c) of the RFP when, on February 22, 1999, it informed IT/NET by e-mail that the intent of the requirement was “to ensure that any firm submitting a proposal demonstrate a formal association/certification with/by Peoplesoft as an authorized dealer, reseller, consulting services partner or what have you”. The Tribunal acknowledges that

the response was provided by means of written words, electronically transmitted, that it was provided by the authorized departmental contact identified in the RFP for that purpose and that it was provided to more than one bidder, although not through MERX. For these reasons, the Tribunal is satisfied that the CSC's response, at least in appearance, carried the requisite authority to be reasonably viewed by IT/NET as an amendment to the RFP and for IT/NET to act in reliance thereof. In addition, the Tribunal is of the view that the CSC's response to IT/NET's request broadens mandatory requirement 8.1.1.1.c) as drafted in the original RFP to include, in addition to the requirement that firms be PeopleSoft implementation partners, strictly defined, any firm capable of demonstrating a formal association/certification with/by PeopleSoft as, *inter alia*, an authorized consulting services partner.

In the circumstances, in the Tribunal's opinion, what the CSC had to determine in respect of mandatory requirement 8.1.1.1.c) of the RFP was whether the proposing firms were PeopleSoft implementation partners or equivalent, as defined in the CSC's response of February 22, 1999. The Tribunal finds that the CSC determined only that IT/NET is not a certified PeopleSoft implementation partner. However, the Tribunal is of the view that the CSC did not properly evaluate whether or not IT/NET demonstrated, in its proposal, a status equivalent to that of a PeopleSoft implementation partner as defined above. On this basis, the Tribunal concludes that, contrary to the provisions of Article 506(6) of the AIT, Article 1015(4)(d) of NAFTA and Article XIII(4)(c) of the AGP, the CSC has not made this award in accordance with the criteria and essential requirements specified in mandatory requirement 8.1.1.1.c), as amended. The complaint, therefore, is valid.

IT/NET alleged that to require, in this instance, that all bidders be PeopleSoft implementation partners is unwarranted and in breach of Article 1009(2)(b) of NAFTA. Given its decision above, the Tribunal will not deal with this question on its merits. The Tribunal observes, however, that qualifications required of bidders as a condition for participation should be expressed in generic terms, specifying the essential skills, knowledge and experience requirements, should not, to the greatest extent possible, refer to a company-specific certification or, if necessary, should clearly allow for equivalents.

The Tribunal is of the view that one of IT/NET's most fundamental entitlements in this instance is that its proposal be evaluated fairly in accordance with the criteria set out in the RFP, including the amendments thereto. It is a fact that, because of the particular way in which mandatory requirement 8.1.1.1.c) was amended by the CSC, not all potential bidders were made aware of the change, let alone at the same time. The Tribunal was concerned by this apparent inequality in the treatment of potential suppliers. In the circumstances, however, the Tribunal is satisfied that those potential suppliers that were certified PeopleSoft implementation partners have not been prejudiced by the absence of notification of the amendment and that those potential suppliers, such as IT/NET, that were not certified PeopleSoft implementation partners could elect not to participate in the solicitation or to acquire such status or, in the further alternative, challenge the requirement and obtain its modification, as was done by IT/NET in this instance.

For the above reasons, the Tribunal will recommend that the CSC re-evaluate the four proposals that it received in response to this solicitation and proceed thereon according to the RFP, as amended, and the trade agreements. The Tribunal, however, must take into consideration the extent to which the current contract might have been performed and, in consideration thereof, will recommend, in the alternative, that, should the re-evaluation indicate that IT/NET should have been awarded the contract, the CSC compensate IT/NET for the profit that it lost by being deprived of the contract.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the applicable provisions of the trade agreements and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the CSC re-evaluate the four proposals that it received in response to the solicitation. This re-evaluation should be performed using the version of mandatory requirement 8.1.1.1c) modified on February 22, 1999. In the event that IT/NET is declared the successful offeror by the CSC in accordance with the evaluation and award provisions set out in the solicitation documents as amended, the Tribunal further recommends that the contract awarded to Deloitte & Touche Consulting Group be terminated and, instead, be awarded to IT/NET.

In the alternative, the Tribunal recommends that the CSC present to the Tribunal a proposal for compensation, developed jointly with IT/NET, that recognizes the profit IT/NET that it lost in being deprived of the contract.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards IT/NET its reasonable costs incurred in relation to filing and proceeding with the complaint.

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Member