CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, March 6, 2000

File No.: PR-99-034

IN THE MATTER OF a complaint, in relation to Solicitation No. W8483-6-EFAA, filed by MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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 Department of Public Works and Government Services terminate the contract awarded to Siemens Westinghouse Technical Services, a division of Siemens Westinghouse Incorporated. The Canadian International Trade Tribunal further recommends that the Department of Public Works and Government Services and the Department of National Defence re-evaluate the technical merits of the proposal submitted by MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc., a joint venture, and the proposal submitted by Fleetway Inc., in accordance with the evaluation methodology set out in the Request for Proposal, and proceed thereon with this procurement as provided in the Request for Proposal and the *Agreement on Internal Trade*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. their reasonable costs incurred in relation to filing and proceeding with the complaint.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be published within 15 days.

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Date of Determination:	March 6, 2000
Date of Reasons:	March 21, 2000
Tribunal Member:	Arthur B. Trudeau
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Gilles B. Legault
Complainants:	MIL Systems (a Division of Davie Industries Inc.) Fleetway Inc.
Counsel for the Complainants:	David Sheriff-Scott J. Bruce Carr-Harris
Intervener:	Siemens Westinghouse Technical Services, a division of Siemens Westinghouse Incorporated
Counsel for the Intervener:	Ronald D. Lunau Michele Ballagh
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Suzan D. Clarke Christianne M. Laizner

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Tuesday, March 21, 2000

File No.: PR-99-034

IN THE MATTER OF a complaint, in relation to Solicitation No. W8483-6-EFAA, filed by MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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

On October 21, 1999, MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. (MIL and Fleetway) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning the procurement[2] (Solicitation No. W8483-6-EFAA) by the Department of Public Works and Government Services (the Department) of in-service support (class design agency and class technical data agency services[3]) for the *Halifax*[4] and *Iroquois*[5] class ships of the Department of National Defence (DND). The contract is for a period of three years, plus two option years.

COMPLAINT

MIL and Fleetway alleged that the Department has breached the preliminary solicitation contract, represented in this case by a Letter of Interest (LOI) (Solicitation No. W8483-6-EFAA/A), the Request for Proposal (RFP) (Solicitation No. W8483-6-EFAA/B) and Articles 506(4), (6) and (7) of the *Agreement on Internal Trade*.[6] Specifically, MIL and Fleetway alleged that the Department has given unfair, unlawful preferential treatment in awarding the in-service support contract to Siemens Westinghouse Technical Services, a division of Siemens Westinghouse Incorporated (SWTS), by providing it with repeated opportunities to meet criteria specified in the LOI and by failing to apply, or to apply properly, prescribed

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. The procurement process involved a Letter of Interest prequalification procedure, followed by a Request for Proposal procedure. The Letter of Interest prescribed mandatory requirements that potential bidders had to meet in order to receive a bid package. Subsequently, a Request for Proposal was issued to qualified potential suppliers.
3. For example, the contractor for the in-service support requirement for the *Iroquois* class ships is responsible for the storage and retrieval, management, change, reproduction, audit, status accounting, updating and design of 3,000 technical manuals containing 600,000 pages, 5,000 engineering drawings, 900 data lists, 250,000 aperture cards and all electronic files. Higher volume requirements are involved in the technical data management for the *Halifax* class ships. Source: Request for Proposal, "Statement of Work".
4. The 12 *Halifax* class ships are general-purpose, helicopter-carrying antisubmarine and antisurface warfare frigates of 4,750 tons each which carry more than 230 military personnel on board.
5. The 4 *Iroquois* class ships are helicopter-carrying, area air defence and command task group destroyers of 5,100 tons each which carry more than 300 military personnel on board.
6. As signed at Ottawa, Ontario, on 8 July 1994 [hereinafter AIT].

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mandatory criteria in both the LOI and the RFP at the time of the qualification of bidders and the evaluation of proposals.

MIL and Fleetway requested, as a remedy, that the contract awarded to SWTS be terminated and that they be awarded the contract. In the alternative, MIL and Fleetway requested that the solicitation be terminated and that a new solicitation for the designated contract be issued. In the further alternative, MIL and Fleetway requested their lost profits. MIL and Fleetway also requested their reasonable costs incurred in filing and proceeding with the complaint.

PROCEDURES BEFORE THE TRIBUNAL

On October 29, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[7] The Tribunal also informed the parties that it would not issue a postponement of award order since a contract had already been awarded to SWTS. MIL and Fleetway subsequently challenged the Tribunal's decision not to issue a postponement of award order in the Federal Court of Appeal. The Federal Court of Appeal dismissed the application.[8] On November 23, 1999, the Tribunal informed the parties that SWTS had been granted intervener status in the matter. On December 17, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[9]

On January 6, 2000, MIL and Fleetway wrote to the Tribunal requesting that the Tribunal order the Department to produce additional documents relevant to the complaint and authorize the disclosure of certain confidential material to an "independent expert" in order to assist MIL and Fleetway to fairly evaluate and respond to the GIR. Having reviewed the parties' submissions in relation to the above request, the Tribunal, in an order dated January 18, 2000, informed the parties that it did not accept the undertaking submitted by the "independent expert" and did not grant permission to counsel for MIL and Fleetway to transmit, in any manner, to the said "expert" information that had been designated as confidential in this proceeding. As well, the Tribunal ordered the Department to file additional documents with the Tribunal on or before January 20, 2000.

On January 24, 2000, MIL and Fleetway requested that the Tribunal authorize them to release a confidential document to an identified consultant to assist MIL and Fleetway in preparing their response to the GIR. Having considered the submissions of the parties, the Tribunal, on January 26, 2000, authorized the disclosure of the said document to the consultant, subject to a number of specific conditions. On January 27, 2000, SWTS filed comments on the GIR with the Tribunal and, on January 31, 2000, MIL and Fleetway filed comments on the GIR with the Tribunal. On February 3, 2000, the Tribunal invited parties to file, as appropriate, comments on the other parties' responses to the GIR. On February 9, 2000, the Tribunal held a teleconference with all the parties to address the admissibility of certain affidavits and the access to confidential information provided in a brief to officials of the Crown. On February 15, 2000, SWTS and the Department filed comments in response to the comments filed by MIL and Fleetway on the GIR and, on February 18, 2000, MIL and Fleetway filed comments in response.

7. S.O.R./93-602 [hereinafter Regulations].
8. (18 January 2000), A—710—99.
9. S.O.R./91-499.

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 June 15, 1998, the Department received a requisition in the amount of $34,700,000 from DND for the subject requirement, including two option years. On July 17, 1998, an LOI for this requirement was posted on Canada's Electronic Tendering Service (MERX). The LOI, as amended,[10] closed on August 11, 1998.

LOI

The LOI provided information to potential bidders with respect to the upcoming requirement, including information regarding the services required, the estimated contract value and the contract period, and advised potential bidders that services would be required as detailed in a Statement of Work (SOW) which would form part of the RFP. The LOI set out the mandatory requirements in order for potential bidders to qualify for receipt of the bid package and also informed potential bidders of various requirements, such as security clearance, government quality assurance, the Crown's forecasted procurement schedule and the notification of any joint venture arrangement.

Specifically, the LOI reads, in part, at paragraph 4:

> Companies requesting a bid package must demonstrate to the Crown's satisfaction, prior to **receiving** a bid package, that they have the following mandatory qualification and experience:
>
> a) Completion of (ie within the last 5 years), or currently managing, at least one (1) contract valued at $1 M or more, in the fields of engineering support[11] and technical data management[12] of Canadian Forces vessels;[13]

at paragraph 5:

> The successful Bidder shall hold a valid security clearance at the level of **SECRET** with approved Document safeguarding at the level of **SECRET** issued by the Industrial Security Division [ISD] of Public Works and Government Services Canada. **Security clearance must be in place prior to Contract award and no later than six (6) months after the LOI closing date specified herein**. If the lowest responsive Bidder does not have the required security clearance in place by this date, the lowest responsive Bidder holding such clearance will be awarded the Contract;

10. There were clarifications of the LOI on three separate occasions which were published as amendments to the LOI on July 17, 23 and 31, 1998, subsequent to the LOI briefing session on July 29, 1998.
11. Defined as the "responsibility for the development of all design changes, and management and control of system configurations down to the equipment level", GIR at para. 3.
12. Defined as including "library type services for the custody and management of technical data, drawings, and publications including the custody and storage, indexing, changes, reproduction and distribution, configuration status accounting and auditing update [for both the *Halifax* and *Iroquois* class ships included in the procurement]", GIR at para. 3b).
13. Amendment No. 3 of the LOI clarified, in response No. 4, subparagraph 4a of the LOI as follows: "The requirement is to show that a bidder has previous experience in the completion or current management of a contract(s) of a value $1M or more irrespective of the duration of the contracts".

and at paragraph 8:

> The forecasted procurement schedule for the above requirement is REVISED as follows:
>
> | | |
> |---|---|
> | BRIEFING SESSION (READING ROOM) | 29 JULY 1998 |
> | RFP ISSUED | 25 AUG. 1998 |
> | BIDDERS CONFERENCE (if required) | 23 SEPT. 1998 |
> | BID CLOSING | 03 NOV. 1998 |
> | SECURITY CLEARANCE RECEIVED | 10 FEB. 1999 |
> | CONTRACT AWARDED | 17 FEB. 1999 |

The LOI also included the following note:

> SHOULD A QUALIFIED COMPANY RESPOND TO THIS LOI AFTER 11 AUGUST 1998, IT WILL BE SENT A REQUEST FOR PROPOSAL AS SOON AS ITS RESPONSE HAS BEEN EVALUATED; HOWEVER, **NEITHER THE RFP CLOSING DATE NOR THE DEADLINE FOR RECEIVING SECURITY CLEARANCE WILL BE EXTENDED DUE TO LATE QUALIFICATION**.

On August 11, 1998, Donelad Hydronautics Limited (Donelad) sent a facsimile and a follow-up courier package to the Department on behalf of In Service Support Group (ISSG), a joint venture. The submission identified, *inter alia*, Westinghouse Canada Inc. as a member of ISSG. The Donelad letter of August 10, 1998, addressed to the Department, described the evidence relied upon by ISSG to satisfy subparagraph 4a of the LOI. Specifically, paragraph 2.a. of Donelad's letter states that the specific experience that the joint venture is offering in order to satisfy that mandatory requirement is Donelad's own experience in managing the Canadian Forces Auxiliary Vessel (CFAV) *Quest* Mid-Life Refit Project from 1996 to August 1998. Donelad claimed that the value of this work was in excess of $1 million and that, therefore, ISSG satisfied the requirement.

Two joint ventures, MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. (hereinafter MIL/Fleetway) and ISSG, qualified to receive the RFP. The RFP was issued to the joint ventures on November 4, 1998.

RFP

The following are excerpts from the RFP, as amended.

Paragraphs 4.0 and 4.1 of Section B read:

> 4.0 The Government reserves the right to request clarifications for any item in the Bidder's proposal. The Bidder shall then have the greater of three (3) calendar days, or the period specified in the clarification request, to submit the information. Canada may disqualify any Bidder who fails to comply with such request within the specified deadline.
>
> 4.1 It is imperative that the individual who is authorized to clarify a Bidder's proposal be available during the bid evaluation period.

Section C reads, in part:

> To be considered responsive, a proposal must (a) meet all the mandatory requirements of this Request for Proposal and (b) meet the required minimum marks for technical merit. Proposals not meeting (a) or (b) above will be given no further consideration and deemed nonresponsive.
>
> A proposal will be declared nonresponsive if it fails to provide the supporting evidence required by a mandatory item or for noncompliance with a mandatory requirement set out in the Request for Proposal (RFP) document or its Annexes.
>
> The lowest priced responsive proposal will be recommended for award of a contract.

1.3 The Bidder must provide with its proposal, evidence of having the following qualifications and experience:

a) Completion of (ie within the last 5 years), or currently managing, at least one (1) contract valued at $1 M or more, in the fields of engineering support and technical data management of Canadian Forces vessels;

1.5 Bidders shall hold a valid security clearance at the level of SECRET with approved Document Safeguarding (as per Clause A2.0 of this document) issued by the Industrial Security Division (ISD) of Public Works and Government Services Canada. Security clearance must be in place prior to award of Contract.

1.8 Proposals must be compliant for technical merit, i.e.: Achieve a pass mark of at least 60% for each of the eight (8) major technical evaluation criteria and an average mark of at least 70% overall when assessed against rated requirements as per paragraph 2.0 below.

1.9 Bidders must be capable of performing the work. To assess the Bidder's capabilities, Canada will conduct an evaluation of, including but not limited to: the Bidder's legal status: facilities: and technical, financial and managerial capabilities to fulfil the requirement stated in this Request for Proposal.

2.0 TECHNICAL MERIT

Proposals shall be evaluated for technical merit as per Annex "H" attached. The evaluation shall assess the Bidder's comprehension of the Work; its knowledge of the DND organization and its vessel fleet; its knowledge of the DND process for technical documentation and configuration control; and the extent of additional experience above the minimum (mandatory) requirement.

Annex H reads, in part:

I. MINIMUM REQUIREMENTS

To be considered technically compliant, Bidders must score at least 60% in each of the eight sections listed below for Rated Requirements and must obtain a minimum of 70% overall. The categories of the Rated Requirements are:

		MAX	PASS
a.	General Requirements	350	210
b.	Project Management Organization Plan	350	210
c.	Class Design Agency Services Plan	800	480
d.	Technical Data Agency Services Plan	400	240
e.	Quality Program Plan	300	180
f.	Data Link Access Plan	100	60
g.	Transition Plan	300	180
h.	Sample Task Requisitions	1100	660
	Overall	3700	2590 (70%)

II. RATED REQUIREMENTS

Proposals shall be rated for technical merit in accordance with SOW, and the Bidder's organization, resources and facilities tendered.

Documents in I. (a) through (h) above shall be evaluated against the following criteria: comprehension of the work, how the work will be performed, personnel tendered, and the logic and clarity of presentation.

1.0 General Requirements – 350 Points

The general requirements shall be evaluated based upon the following:

a.	demonstrated understanding of the SOW requirement;	40
b.	past experience of the Bidder in projects of a similar nature and magnitude;	40
c.	knowledge of the HALIFAX and IROQUOIS Ship Class Super-systems and related engineering experience;	40
d.	experience with naval equipment and naval technical data management;	80
e.	experience in configuration management and automated documentation management systems; and	50
f.	depth of experience in Naval warship design and integration	100

Further Prequalification

Several months after the LOI closing date, additional requests for prequalification were submitted, independently of the two joint ventures, by Fleetway Inc. and by SWTS. During that period, correspondence was exchanged between ISSG, SWTS and the Department.

On February 4, 1999, ISSG wrote to the Department as follows:

> There is an agreement among the ISSG group of companies that has been in effect since 1995, where one company acts as a Prime Contractor on a particular Project.
>
> Should our Proposal be successful, the Contract will be awarded in the name of the Prime Contractor – Siemens Westinghouse Technical Services.

On February 8, 1999, the Department wrote to SWTS as follows:

> [P]lease be advised that your newly proposed organizational structure must, prior to being able to bid on the above referenced requirement, be re-qualified in accordance with our [LOI] which closed on 11 August 1998.
>
> Please submit, on the Prime Contractor's letterhead, a response to the LOI which demonstrates that the newly proposed structure meets the minimum mandatory requirements specified in the LOI and advise whether your response is in lieu of **or** in addition to your original ISSG (Joint Venture) LOI response.

On February 9, 1999, SWTS responded as follows:

> [T]his letter is to advise that [SWTS] will on behalf of the ISSG group act as the prime contractor for the In service Support Requirements for Halifax and Iroquois Class ships referenced in solicitation # W8483-6-EFAA.
>
> The ISSG Group has an agreement in place of which a copy has been submitted to you describing this arrangement. We realize that as the prime contractor, [SWTS] is responsible for the work of our partner subcontractors.
>
> The original [LOI] dated August 10, 1998 and the subsequent correspondence by which the ISSG group was qualified remain the documents by which [SWTS] wishes to qualify in lieu of our original ISSG response.

On February 11, 1999, SWTS wrote to the Department enclosing a complete set of documents with which ISSG had qualified in accordance with the LOI. The February 11, 1999, letter states, in part:

> 2. It is requested that this ISSG qualifying documentation be the basis for the right of [SWTS] to also quote on the subject Solicitation as a Prime Contractor for the other three ISSG companies.

On February 17, 1999, SWTS wrote again to the Department, listing the specific evidence and submissions to qualify SWTS under subparagraph 4a of the LOI. Qualification document No. 1 reads, in part:

> 2. Donelad (and SWTS) has the following mandatory qualifications and experience as required in order to receive a bid package:
>
> a. Management of C.F. Vessel Engineering Support and Technical Data
>
> Donelad has managed the CFAV QUEST Mid-Life Refit (MLR) Project from 1996 to the present. The engineering support and technical data management portion of this project is well in excess of $1M.
>
> Donelad provided to Marystown Shipyard Ltd./Friede Goldman Newfoundland Ltd. for the QUEST MLR, inter alia, the Engineering Manager, Cost Control and Planning Manager.

Qualification document No. 2, also included with SWTS's February 17, 1999, letter to the Department, relates to the personnel requirements identified in subparagraphs 4b to 4h of the LOI. Paragraph 1.c of qualification document No. 2 reads, in part:

> For the past three (3) years, Mr. . . . P. Eng., of WCI Dartmouth, Nova Scotia was Project Engineer for all electric (and gas turbine) overhaul, design, fabrication, training and test/trials for the Mid-Life Baseline Refit, modernization and life extension of CFAV QUEST, the world's quietest surface ship. WCI designed, built, tested and is presently installing a new IMCAS (Integrated Machinery Control, Monitoring and Alarm System) on QUEST.

SWTS qualified under the LOI and was advised accordingly on February 17, 1999. Fleetway Inc. was also qualified.

Handbook

During the time period between the issuance of the RFP on November 4, 1999, and bid closing on February 26, 1999, the Department and DND prepared the technical evaluator's handbook (the Handbook) which was finalized on February 19, 1999.

The Handbook states, under principle No. 1, that the evaluation process, as described in the evaluation plan of the RFP, cannot be changed. The Handbook, under principle No. 3, indicates that only information provided in a bidder's proposal shall be used to evaluate that proposal. The Handbook further instructs evaluators that, if a bidder provides an unclear response, evaluators can seek clarification through the evaluation committee.

Paragraph 10 of the Handbook reads, in part:

> i.i. **Technical Assessment**: . . . The Technical Assessment will quantitatively assess each of the requirements in selected assessment categories from a technical perspective. Each requirement will receive a "pass" or "fail" assessment based on predetermined criteria that are highlighted with each of the assessment categories on the "Evaluation Table and Scoring Sheets".

Paragraph 15 of the Handbook reads, in part:

> Requirements in the eight categories will be scored on a Pass/Fail basis. Evaluation guidance is provided below:

a. **Pass** – A "pass" shall be accorded if the responses addressing a requirement are acceptable, with sufficient depth of talent and Naval warship/marine engineering experience identified, (all deficiencies to be noted).

Paragraph 20 of the Handbook reads, in part:

Each requirement within a category will be assessed either a "P" (pass) or "F" (fail). The number of passes and fails are then added and injected into a "scoring equation" which will determine the earned points for Technical Requirements and Overall Compliance.

Three proposals were submitted by SWTS, Fleetway Inc. and MIL/Fleetway.

The three proposals were evaluated by the Department and DND as being compliant and, on May 18, 1999, having completed their review, the technical evaluators recommended contract award to SWTS.

On May 21, 1999, the ISD wrote to SWTS requesting corporate information in order to process its security clearance application. On June 11, 1999, SWTS submitted an application and was issued a security clearance on August 18, 1999. On September 29, 1999, Treasury Board's approval was received, and the in-service support contract was awarded to SWTS on October 8, 1999. MIL/Fleetway and Fleetway Inc. were advised accordingly that same day.

VALIDITY OF THE COMPLAINT

Department's Position

The Department submitted that the procurement process, which is the subject of this complaint, namely, the LOI and the RFP, are two separate and distinct procedures subject to different requirements of the AIT. The LOI is an "invitation to qualify" or "request for qualification", whereas the RFP is a "call for tenders". The Department argued that the LOI is distinguishable from the RFP in several very important ways. First, an LOI does not solicit competitive bids. Its primary purpose is to prequalify suppliers and to determine a bidder's interest in the procurement. By contrast, the call for tenders clearly solicits both technical and financial proposals. Second, an LOI is a prequalification procedure to identify potential suppliers entitled to bid. Under the LOI procedure, suppliers may be asked to submit clarifications and further information in order to qualify. Third, an LOI response may be modified within the time constraints of the RFP tendering period until such time as the supplier can demonstrate that it meets the requirements of the LOI and, thereby, qualifies for receipt of the RFP. On the other hand, bid repair is not permissible in the context of submissions made in response to a call for tenders. Fourth, in contrast to the application of strict rules regarding bid closing, suppliers are permitted to respond to an LOI after its closing date and even after issuance of the RFP, as did Fleetway Inc. for example, provided there is sufficient time before the RFP closing date.

With respect to MIL and Fleetway's allegation that the requirements for security clearance contained in the LOI were not met by SWTS, the Department submitted that there are no security clearance requirements for LOI prequalification. This assertion, the Department argued, is supported by the wording of paragraphs 4, 5 and 8 of the LOI which makes it clear that receipt of the required level of security clearances is not a mandatory requirement for qualification under the LOI, nor is it even a mandatory condition for the submission of bids under the RFP as at the RFP closing date, subject only to the LOI provision that "NEITHER THE RFP CLOSING DATE NOR THE DEADLINE FOR RECEIVING SECURITY CLEARANCE WILL BE EXTENDED DUE TO LATE QUALIFICATION".

On the question of the mandatory requirement for past experience set out at subparagraph 4a of the LOI, the Department argued that this requirement may be satisfied by evidence of work performed under contracts or subcontracts valued at $1 million or more, in the fields of engineering support and technical data management of Canadian Forces vessels. The Department submitted that SWTS's response to the LOI as prime contractor on behalf of ISSG demonstrated that SWTS and Donelad met the requirements for experience in managing at least one contract valued at $1 million or more. This experience was demonstrated by Donelad and SWTS (operating under its former name Westinghouse Canada Inc.) which provided engineering support and data management to the CFAV *Quest* under individual contracts with Marystown Shipyard Limited (Marystown) (now Friede Goldman Newfoundland Ltd.), the prime contractor for the CFAV *Quest* Mid-Life Refit Project.

The Department submitted that there were no delays in the LOI and RFP processes to give SWTS preferential treatment, nor were there delays associated with the issuance of the RFP for the purpose of giving SWTS the opportunity to become compliant with the LOI. The length of time associated with the preparation and issuance of the RFP, the Department submitted, was entirely unrelated to the LOI qualification process or to the circumstances of any particular bidder.

With respect to the allegations pertaining to the RFP process, the Department submitted the following:

- MIL and Fleetway's allegation that the Department delayed contract award to favour SWTS by waiting until security clearances were in place before making a Treasury Board submission for contract approval is vexatious and entirely unsupported by credible evidence.
- The requirement of the RFP that the successful bidder's security clearance be in place prior to contract award was, in fact, satisfied.
- The evaluation criteria to be used in the evaluation of proposals were clearly set out in the RFP, specifically, Annex H, "Technical Evaluation Plan". A detailed handbook was also prepared prior to bid closing to assist the evaluators with the technical evaluation of the RFP rated requirements, and there is no requirement under the AIT to include the Handbook in the tender documents. In order to reduce the degree of subjectivity in the evaluation of rated requirements, evaluation items in the RFP were further broken down into a total of 549 subitems which were individually and independently assessed by 10 evaluators.
- Contrary to MIL and Fleetway's allegation, the translation of pass/fail assessment and roll-up for the assessment of pass/fail for each section and for the overall assessment is fair and in line with the evaluation criteria set out in the RFP.
- The results of the evaluation demonstrate that MIL/Fleetway's proposal and SWTS's proposal indicated strong technical capability exceeding the required pass marks in all individual and overall criteria by a significant margin. In the final result, the Department submitted, selection for contract award was determined by financial proposals.

The Department concluded by indicating that SWTS's proposal in the amount of $16,733,073.13 was the lowest price-responsive proposal and that, therefore, it awarded the contract to SWTS in accordance with the RFP.

In its additional comments of February 15, 2000, the Department submitted that it and DND determined that SWTS's experience in the CFAV *Quest* Mid-Life Refit Project is unquestionably of the type, magnitude and complexity required by subparagraph 4a of the LOI. The Department argued that MIL

and Fleetway are attempting to have the Tribunal construe the experience requirements of the RFP so narrowly as to eliminate competition and inevitably direct contract award to MIL/Fleetway.

Specifically, the Department submitted that SWTS's work under the CFAV *Quest* Mid-Life Refit Project and the Marystown purchase order unequivocally and adequately demonstrated SWTS's experience under subparagraph 4a of the LOI and is determinative of the issue of SWTS's qualification under the LOI requirement for past experience. The Department also submitted that it was entitled to independently review third-party information in the Crown's possession concerning the CFAV *Quest* contract and that it was not necessary to request SWTS to produce additional information.

The Department submitted that subparagraph 4a of the LOI dealing with past experience is a minimum threshold requirement to show that a bidder has relevant experience in the scope of services to be provided, but does not require extensive experience in the systems identified in the SOW. Furthermore, the Department submitted that the Marystown purchase order clearly involved a contract in excess of $1 million, that the CFAV *Quest* is a sophisticated 2,200-ton oceanographic research ship and that the integrated machinery control, monitoring and alarm system designed, built and tested by SWTS is anything but a subsystem and is at the heart of the total propulsion and machinery system that controls and drives the ship. As well, in the Department's submission, the Marystown purchase order documents genuine engineering support and technical data management service requirements. For the same general reasons, the Department submitted that SWTS's proposal met subparagraph 1.3a) of Section C of the RFP.

Concerning MIL and Fleetway's allegation that, for all the rated requirements in the RFP, the evaluation had to be restricted to the experience and qualifications of the bidder itself and could not be extended to the qualifications and experience of the personnel proposed by the bidders, the Department submitted that such a general restriction is simply not set out in the RFP.

With respect to MIL and Fleetway's allegation that the Department and DND improperly evaluated subcontractors' experience towards qualifying SWTS's proposal, the Department submitted that this allegation is late and unsupported. As well, only SWTS's experience in respect of the CFAV *Quest* was evaluated under the rated requirement for "past experience of the bidder". The other projects cited were associated with the experience and qualifications of the personnel proposed by SWTS, including former Donelad employees and, the Department submitted, consideration of such experience and qualifications was acceptable under the terms of the RFP. In addition, the Department submitted that it is not uncommon for the Department to evaluate proposals containing information in one section of a proposal not pertinent to one requirement but pertaining to another requirement in the RFP. The Department argued that it is required to evaluate an entire proposal and to evaluate all information which is responsive to the requirements of the RFP. Therefore, it was necessary for the Department to evaluate "Bidders' Experience" on the basis of SWTS's work on the CFAV *Quest* Mid-Life Refit Project referenced in section 1.6 of its proposal.

Concerning the Department's evaluation of SWTS's depth of experience in naval warship design and integration under subparagraph 1.0 f. of Annex H to the RFP, the Department submitted that MIL and Fleetway improperly concluded that the Department erred in its assessment of SWTS's experience by considering the experience of all personnel proposed. The Department submitted that it was entitled to consider and did consider such experience, as no rule in the RFP restricted the assessment of experience to the bidder's experience only.

With respect to MIL and Fleetway's allegation that the evaluation rules were changed, skewed or biased in the Handbook to favour SWTS, the Department submitted that the Handbook did not change the rated requirements in paragraph 1.0 of Annex H to the RFP because subparagraph 1.0 f. requiring "depth"

of experience was not diluted as shown in the definition of the word "pass" in the Handbook, which was contingent on the demonstration of depth of experience; the evaluation table and scoring sheets were not substituted for the Handbook; and the general requirements and project management organization plan were evaluated in accordance with the provisions of the corresponding rated requirements of the RFP, as instructed in the Handbook. Furthermore, the Department submitted that the compressing of technical merit scores into a narrow bandwidth does not detract from the validity of the methodology in checking against the required 60 percent and 70 percent thresholds in the RFP.

SWTS's Position

SWTS noted, first, that it supports the statements of fact and submissions contained in the GIR.

On the question of the alleged preferential treatment of SWTS by the Department with respect to the security requirements, SWTS submitted that the contract was awarded almost two months after SWTS was granted the requisite security clearance by the ISD in full compliance of the terms of the RFP, which provided that security clearance must be in place prior to award of contract.

With respect to MIL and Fleetway's allegation that the Department failed to apply certain mandatory criteria relating to the bidder's experience in conducting this procurement, SWTS submitted that purchase order No. 4340-05 between Marystown and SWTS (at the time Westinghouse Canada Inc.) for the CFAV *Quest* Mid-Life Refit Project demonstrates clearly that SWTS was able to satisfy the mandatory requirement for past experience set out in the LOI.

With respect to MIL and Fleetway's allegation that the Department failed to evaluate proposals fairly, SWTS submitted that both its proposal and that of MIL/Fleetway demonstrated a standard of technical ability which exceeded the required pass mark by a significant margin and that, therefore, it cannot be said that MIL/Fleetway were prejudiced in the solicitation by the technical evaluation of the proposals.

With respect to MIL and Fleetway's allegation that SWTS did not have the requisite mandatory experience, in that SWTS's experience on the CFAV *Quest* was not sufficient for the purposes of the LOI and the RFP, SWTS submitted that the Marystown purchase order satisfies the mandatory requirements set out in subparagraph 4a of the LOI, subparagraph 1.3a) of Section C of the RFP and subparagraph 1.0 b. of Annex H to the RFP in that: (a) it clearly relates to a Canadian Forces vessel; (b) it is dated within the last five years; (c) it is valued at much more than $1 million; (d) it is in the fields of engineering support and technical data management; and (e) it demonstrates past experience with a project of a similar nature and magnitude to the contract. Further, SWTS argued that the Tribunal is not entitled nor qualified to second-guess the judgment of the Department when evaluating SWTS's experience in engineering support and technical data management as disclosed by the Marystown purchase order. Absent some evidence of procedural unfairness, SWTS submitted that the Tribunal does not have the authority to review and substitute its judgment for that of the Department or DND on technical matters relating to the qualifications of bidders or the merits of their proposals.

With respect to MIL and Fleetway's allegation that the Department failed to apply the stated criteria in the RFP when evaluating SWTS's proposal or changed the requirements of the RFP to favour SWTS when it prepared the Handbook, SWTS submitted that the criteria set out in the RFP must be considered in the context of two important factors: the contract in dispute represents virtually all of the available work of this kind in Canada at present, and previous in-service support contracts for these services have been directed to MIL Systems (a Division of Davie Industries Inc.), on a noncompetitive basis, since 1945. In this context, SWTS argued, MIL and Fleetway have deliberately attempted, in the complaint and in their

response to the GIR, to impose interpretations on the qualifying provisions of the RFP which are designed to exclude all reasonable competition that exists in the marketplace.

With respect to the Handbook, SWTS submitted that, in essence, the sample task requisitions were designed to literally test the bidder's ability to perform the work required by the contract. SWTS noted that, by failing only one sample task requisition, compared to five for MIL/Fleetway, SWTS demonstrated a significantly superior ability to perform the work required under the contract. This outcome, SWTS submitted, was not likely to occur had the evaluation criteria been lowered in the Handbook to favour inexperienced bidders.

MIL/Fleetway's Position

MIL and Fleetway submitted that a plain reading of subparagraph 4a of the LOI and response No. 4 of amendment No. 3 to the LOI indicates that any "company" seeking a bid package had to demonstrate that it, alone, possessed sufficient experience of having completed a contract in excess of $1 million in value in the relevant fields of engineering support and technical data management of Canadian Forces vessels. MIL and Fleetway added that, although the LOI allows for the possibility of a bidder teaming with others, this format is only permitted through the instrument of a joint venture. It follows, MIL and Fleetway submitted, that where the Department requires a bidder to have particular historical work experience, such a bidder is not, in the absence of a joint venture, permitted to rely on the credentials of a mere subcontractor to prove those qualifications.

MIL and Fleetway submitted that the Department's suggestion in the GIR that SWTS qualified under subparagraph 4a of the LOI by virtue of its February 17, 1999, submission, is wrong and misleading. Qualification document No. 1, referenced by the Department, shows that SWTS only pointed to the experience of its subcontractor, Donelad, to satisfy subparagraph 4a of the LOI. With respect to the Department's more recent attempt in its letter of January 21, 2000, to suggest that SWTS qualified under subparagraph 4a of the LOI by virtue of qualification document No. 2 attached to SWTS's submission of February 17, 1999, MIL and Fleetway submitted that it is also wrong and misleading, since the said document has nothing to do with subparagraph 4a of the LOI, but instead relates to personnel requirements identified in subparagraphs 4b to 4h of the LOI.

Concerning the Department's assertion in the GIR that it "independently verified" SWTS's qualifications by investigating "third party information in the Crown's possession relating to the CFAV Quest contract", MIL and Fleetway submitted that this constitutes an admission on the part of the Department that SWTS did not point to the project in its February 17, 1999, LOI response to qualify under subparagraph 4a of LOI. MIL and Fleetway submitted that the Department's position regarding the CFAV *Quest* is an attempt to credit SWTS with experience that it did not even claim to have.

MIL and Fleetway submitted that: (a) when an LOI requires a company to have specific historical corporate experience, the company must individually satisfy such a requirement; (b) such a requirement cannot be satisfied by simply assembling one or more qualified subcontractors; and (c) in the absence of a joint venture, bidders themselves must clearly demonstrate that they satisfy the minimum mandatory qualifications under the LOI. MIL and Fleetway submitted that, in this case, SWTS never attempted to satisfy the requirement that it had the experience required under subparagraph 4a of the LOI. Both the original LOI submission by ISSG and the subsequent LOI submission by SWTS only referred to the experience of Donelad to satisfy this requirement. SWTS did not qualify under the LOI alone and, therefore, the Department breached its own stated criteria. SWTS, MIL and Fleetway submitted, was not entitled to bid.

MIL and Fleetway submitted that subparagraph 1.3a) of Section C of the RFP, paragraph 1.0 of Annex H to the RFP and the language of the RFP at large clearly required that bidders, alone, had to satisfy the stated mandatory experience requirements. In this case, MIL and Fleetway submitted, SWTS tendered only the evidence of its subcontractors to satisfy the requirements of subparagraph 1.3a) of Section C of the RFP and paragraph 1.0 of Annex H to the RFP. Therefore, MIL and Fleetway submitted that SWTS was not compliant with the RFP and that, by allowing SWTS to tender the experience of its subcontractor, the Department, after bid closing, changed the terms of the RFP, thereby breaching the terms of the AIT.

MIL and Fleetway submitted that SWTS failed to qualify under subparagraph 1.3a) of Section C of the RFP by virtue of the CFAV *Quest* Mid-Life Refit Project because: (a) the Marystown purchase order did not contain any requirement on Westinghouse Canada Inc. to perform technical data management services; (b) SWTS was a mere supplier of equipment on the CFAV *Quest* in relation to a subsystem and did not provide the type of engineering support contemplated by subparagraph 1.3a) of Section C of the RFP; (c) the CFAV *Quest* is quantitatively and qualitatively different from the warship indicated in the RFP; (d) subparagraph 1.3a) of Section C of the RFP required experience in a class of vessels and the CFAV *Quest* is a single research ship; and (e) the financial $1 million limit in subparagraph 1.3a) of Section C of the RFP was not satisfied by the Marystown purchase order. Simply stated, the Marystown purchase order is not the type of contract contemplated by subparagraph 1.3a) of Section C of the RFP.

Furthermore, MIL and Fleetway argued that a review of the Marystown purchase order clearly demonstrates that the work done by SWTS on the CFAV *Quest* Mid-Life Refit Project does not, and could not, meet the mandatory requirements of the RFP. The scope of the work described in the RFP itself makes it clear that a high order of experience in technical data management and design agency services in a multiwarship, multisystem environment was intended and that a simple subsystem development and installation on a simple auxiliary vessel, as described in the Marystown purchase order, was not adequate experience under subparagraph 1.3a) of Section C of the RFP. MIL and Fleetway further noted that paragraph 1.0 of Annex H to the RFP set out a number of significant criteria relating to the past experience of the bidder, including knowledge of the *Halifax* and *Iroquois* class ships, naval equipment, naval technical data management and naval warship design. In this context, MIL and Fleetway submitted that SWTS, a company with no previous experience in these areas, could not have qualified under this section of the RFP unless the Department considered the experience of its subcontractor, which was not permitted by the RFP. MIL and Fleetway submitted that, by identifying SWTS as the successful bidder based on its subcontractor's experience, the Department deviated from the clear criteria required to be applied to bidders in the RFP, thereby violating Article 506(6) of the AIT.

MIL and Fleetway submitted that paragraphs 1.8, 1.9 and 2.0 of Section C of the RFP and Annex H clearly set out the evaluation methodology to be used in this instance by the Department in assessing proposals. MIL and Fleetway submitted that the evaluation methodology clearly indicated that a numerical score was to be assigned in the evaluation of each of the eight rated category requirements. Therefore, MIL and Fleetway submitted, the RFP required the Department to assign discrete quantitative ratings to each of the subsections. These discrete numerical scores were to be rolled up to give an aggregate score under each of the eight categories. If scores in each section were above 60 percent, then individual rated sections would be passed. The numerical score would also identify additional experience above the minimum which would possibly contribute to raising the bidders' average scores under all eight categories to a figure higher than the mandatory 70 percent overall rating needed.

MIL and Fleetway argued that the Department changed these rules by issuing the Handbook to evaluators. The changes were completed after the Department knew about the experience and qualification of each bidder through the LOI submissions. In this context, MIL and Fleetway submitted that the

Handbook, used in evaluating proposals, permitted an evaluation process at odds with both the clear terms and obvious intent of the RFP. It grossly skewed the technical evaluation process in favour of unqualified and inexperienced bidders such as SWTS. In so doing, MIL and Fleetway submitted, the Department clearly violated Article 506(6) of the AIT.

In addressing the timeliness of certain grounds of the complaint, MIL and Fleetway submitted that, prior to the award of the contract, it had no detailed knowledge of the basis upon which SWTS sought to qualify nor any reasons to assume that there was a danger that the Department would not properly apply the mandatory requirements of the RFP or would alter the evaluation criteria in the RFP to favour SWTS. Further, MIL and Fleetway submitted that they became aware of the existence of the Handbook only after the debriefing session held by the Department on October 20, 1999.

With respect to the "expert" opinions contained in MIL and Fleetway's response to the GIR, MIL and Fleetway submitted that the Department and SWTS have not attempted to contradict those opinions with opinions of their own "expert" and have not, in fact, refuted the central propositions at issue.

MIL and Fleetway submitted that the Department has acknowledged that it based its qualification of SWTS under subparagraph 1.3a) of Section C of the RFP solely on the latter's work on the CFAV *Quest* Mid-Life Refit Project. It follows, therefore, that, if that work does not meet the experience requirement in the RFP, SWTS should not have been awarded this contract. In this context, MIL and Fleetway reiterated that the work described in the Marystown purchase order does not equate with the requirements set out in the RFP in respect of previous experience in engineering support and technical data management for the two classes of Canadian warship contemplated by the RFP. In addition, there is no indication that "engineering support" or "technical data management", as discrete elements of the Marystown purchase order work, represented a $1 million activity on the project. MIL and Fleetway further submitted that, even if it is accepted that the requisite experience with a noncombatant Canadian Forces ship of the nature and size of the CFAV *Quest* would qualify as a Canadian Forces vessel for the purposes of the RFP, the mandatory requirement on its plain wording requires experience with more than one such vessel. However, SWTS relied solely on the CFAV *Quest* to satisfy this provision.

With respect to the Department's acknowledgment that, in order to qualify SWTS's proposal, it "independently" verified certain information in its possession, MIL and Fleetway submitted that the Department was not entitled, under the provisions of the RFP and the applicable general law, to resort to its own information in order to qualify a bidder with respect to a mandatory requirement. This, MIL and Fleetway submitted, amounted to bid repair by the Department and represents a behaviour in contravention of the terms of the RFP and breaches the rules of natural justice and procedural fairness. If the Department required clarification, it should have used the approach set out in paragraph 4.0 of Section B of the RFP. In any event, MIL and Fleetway submitted that the Handbook, at principle No. 3, stated clearly that only information provided in a bidder's proposal shall be used to evaluate that proposal.

With respect to the Department's contention that there is no general restriction in the RFP limiting the assessment of past experience to the bidder's experience proper, MIL and Fleetway submitted that there was such a rule set out in paragraph 2.0 of Section C of the RFP.

MIL and Fleetway submitted that the Department admits in its February 15, 2000, comments that subparagraph 1.0 b. of Annex H to the RFP required an analysis of bidder experience only and that it accordingly ignored the experience of both Donelad and the future personnel tendered by SWTS. Given that, to this end, the Department and DND evaluated SWTS's experience solely on the basis of the CFAV *Quest* Mid-Life Refit Project referenced in section 1.6 of SWTS's proposal and concluded therefrom

that SWTS met that requirement, it necessarily follows that the Department ignored or misapplied an essential element of subparagraph 1.0 b., which requires a bidder to show past experience of the bidder in projects of a similar nature and magnitude, i.e. a multimillion dollar in-service support contract for 16 warships, in two classes, containing both engineering and technical data management functions of enormous breadth and complexity.

With respect to the evaluation by the Department of SWTS's proposal under subparagraphs 1.0 c., d. and f. of Annex H to the RFP, MIL and Fleetway submitted that the Department unreasonably concluded that the information offered in SWTS's proposal in that respect demonstrated the experience requirements of the RFP.

On the question of the evaluation issue, MIL and Fleetway submitted that the Handbook changed the terms of the RFP so as to be clearly inconsistent with the terms of the latter to the point where it is not possible to tell whether, if properly scored, any bidder would have met the overall requirements.

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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the AIT.

Admissibility of Certain Evidence

The Tribunal wishes, first, to address a matter raised by the Department and SWTS relating to the admissibility of certain evidence contained in "expert" opinions and affidavits filed by MIL and Fleetway in the course of this proceeding. The Department and SWTS submit that this evidence should be ignored or given little weight by the Tribunal since the "experts" were not properly qualified by the Tribunal, a number of affidavits were not properly tested through cross-examination and certain other affidavits, although tested through cross-examination, have been derived from a related proceeding before the Federal Court of Appeal and, therefore, have been introduced in this proceeding in breach of the "implied undertaking" rule.

In reaching its determination in this matter, the Tribunal considered all the information and evidence on the record of this proceeding, including the alleged "expert" opinions and affidavits. However, the Tribunal wants to make it clear that the evidence in the above-mentioned documents was considered by the Tribunal only and strictly as advice in support of counsel's arguments. In its order of January 26, 2000, the Tribunal stated that Mr. Thompson would act as "a person providing assistance to counsel for MIL and Fleetway in the preparation [of] their clients' response to the Government Institution Report". The Tribunal reiterated this position in a letter to the parties dated January 27, 2000, which reads: "Please note that, in its Order, the Tribunal did not recognize Mr. Thompson as an expert but as a person providing assistance to counsel for MIL and Fleetway in preparing their response to the Government Institution Report", and again on February 9, 2000, on the occasion of a teleconference with all the parties during which the Presiding Member stated for the record that the Tribunal has not qualified anyone as experts in this particular proceeding. The Tribunal was of the view that Mr. Thompson is a person assisting counsel.

With respect to the admissibility of the affidavits, the Tribunal, during the above-mentioned teleconference, informed the parties in its ruling that "[t]he Tribunal will accept the affidavits on the file, and

we'll give them the weight that they deserve".[14] The Tribunal notes, in this regard, that section 34 of the CITT Act allows it to "obtain information that in its judgment is authentic, otherwise than under the sanction of an oath or affirmation, and use and act on the information". While some of the affidavits in question were made and sworn in the context of other proceedings before the Federal Court of Appeal, the Tribunal accepted them, subject to their relevance.

Disposal of Certain Grounds of Complaint

In its comments of February 15, 2000, SWTS submitted that the facts relied upon by MIL and Fleetway with respect to the allegation that the Department unfairly gave ISSG or SWTS repeated opportunities to meet the criteria specified in the LOI were known to MIL/Fleetway in the fall of 1998. As well, the facts relied upon by MIL and Fleetway with respect to the allegation that the Department unfairly changed or relaxed the terms of the LOI in the RFP were known to MIL/Fleetway on or about the issuance of the RFP on November 4, 1998. Therefore, SWTS submitted that these grounds of complaint should be dismissed, as they fail to meet the time limits prescribed in section 6 of the Regulations for filing a complaint with the Tribunal.

The Tribunal notes that MIL and Fleetway did not pursue the above-mentioned grounds of complaint after the production of the GIR by the Department (with the exception of the question of the security clearances) and, therefore, subject to this exception, the Tribunal has not considered these grounds of complaint any further.

In fact, the above grounds of complaint are not the only ones which MIL and Fleetway have elected not to pursue after the production of the GIR. The same is true of MIL and Fleetway's allegation that the Department failed to conduct a mandatory facility inspection of all bidders at the time of bid evaluation; the Department relaxed the requirements for engineering personnel in ship combat systems hardware and software integration to hardware integration only; the Department improperly evaluated MIL/Fleetway's proposal with respect to sample task No. 11; the Department delayed aspects of the procurement process in order to favour SWTS; and changes in wording between the evaluation scheme set out in the RFP and the one described in the Handbook significantly altered the evaluation framework in the RFP in favour of less experienced bidders. Given that MIL and Fleetway have not pursued these grounds of complaint after the filing of the GIR or in its further submission, the Tribunal has not considered any of these grounds of complaint any further.

The Tribunal does not agree with SWTS's submission that the facts relied upon by MIL and Fleetway with respect to the allegation that SWTS did not have the experience required by the LOI for prequalification were known or should have been known to MIL/Fleetway on February 17, 1999, when a list of the prequalified bidders was issued by the Department and that, therefore, this allegation should be dismissed for late filing. In the Tribunal's opinion, although it is reasonable to think that MIL/Fleetway knew that SWTS prequalified as a potential supplier on or about February 17, 1999, it does not necessarily follow that MIL/Fleetway knew, by then, the basis upon which the Department had qualified SWTS or how the Department had applied the prequalification criteria. In the Tribunal's opinion, these facts surfaced only after the evaluation of the proposals and, therefore, this ground of complaint is timely.

Concerning the Department and SWTS's submission that MIL and Fleetway's allegations with respect to the evaluation of certain rated requirements ("General Requirements") in SWTS's proposal are new allegations raised in an untimely manner, the Tribunal finds these grounds timely. In the Tribunal's

14. *Ibid*. at 40.

opinion, MIL/Fleetway were not in a position to know how the Department and DND conducted the technical evaluation of the proposals until after the evaluation was completed, the results announced and its debriefing held. In addition, the Tribunal is satisfied that MIL and Fleetway's complaint filed with the Tribunal on October 21, 1999, clearly challenged the Department and DND's conduct in evaluating SWTS's proposal and, therefore, in the circumstances, this ground of complaint cannot be characterized as a "new allegation".

In its final submission to the Tribunal of February 18, 2000, MIL and Fleetway described their "central" complaints as follows: "in awarding the Contract to SWTS, [the Department] failed to apply the mandatory criteria for experience under Article 1.3(a) and elsewhere in the RFP and, in evaluating the bids and awarding the Contract to SWTS, changed the rated requirements and scoring system for such evaluation".

The Tribunal concludes from this restatement by MIL and Fleetway of their grounds of complaint, and the absence therein of any mention of SWTS's qualification under subparagraph 4a of the LOI, that MIL and Fleetway do not consider, any longer, this question of qualification under the LOI as central to their complaint. Accordingly, the Tribunal will not address this issue any further. By way of consequence, the Tribunal further concludes that MIL and Fleetway do not wish the Tribunal to pursue the various issues relating to the question of the "contractual" links, if any, that might exist between the LOI and the RFP and the obligations, if any, on the Department resulting therefrom. The Tribunal, therefore, will not pursue this matter any further.

Merits of the Case

Article 506(1) of the AIT provides that each party shall ensure that the procurement covered by Chapter 5 is conducted in accordance with the procedures set out in Article 506. Article 506(6) of the AIT provides, in part, 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 methods of weighting and evaluating the criteria".

In deciding MIL and Fleetway's central complaints, the Tribunal will determine whether the Department and DND, in declaring SWTS's proposal responsive, conformed to the terms and conditions set out in the RFP and to the evaluation criteria and methodology. This will entail considering two specific questions:

- whether the Department and DND properly concluded that SWTS's proposal met the mandatory requirement under subparagraph 1.3a) of Section C of the RFP for qualification and experience in declaring that bid responsive; and
- whether the Department and DND respected the evaluation scheme, criteria and methodology set out in the RFP in assessing the technical merits of SWTS's and, for that matter, MIL/Fleetway's and Fleetway Inc.'s proposals.

RFP Mandatory Requirement

From a plain reading of Section C ("Evaluation Criteria") of the RFP, it is clear that, to be responsive, a proposal had to meet all the mandatory requirements.[15] Section C further provides that a proposal will be declared nonresponsive if it fails to provide the supporting evidence required by a mandatory item.

15. Paragraph 4.1 of Section C of the RFP.

The parties agree that subparagraph 1.3a) of Section C of the RFP is mandatory. According to that requirement, bidders had to provide, with their proposals, evidence of having completed, within the last five years, or currently managing at least one contract valued at $1 million or more in the fields of engineering support and technical data management of Canadian Forces vessels. The Tribunal is not satisfied that such evidence was included in SWTS's proposal.

In response to the Tribunal's request of January 18, 2000, to produce a copy of all the relevant portions of SWTS's proposal on which it relied to establish SWTS's qualification under subparagraph 1.3a) of Section C of the RFP, the Department pointed out to the following elements of SWTS's proposal:

1) Section 2.0, "SWTS Company Profile", in particular, paragraph 2.4;
2) Section 2.5 "Marine Capabilities", in particular, paragraph 2.5.11;
3) Section 1.2 "Past Experience in Similar Projects", paragraphs 1.2.1 and 1.2.2, and 1.2.5, particularly as related to the CFAV QUEST contract;
4) Section 1.6 "Experience in Naval Warship Design and Integration" as related to the CFAV QUEST contract.

The above references appear in SWTS's proposal under such headings as "Company Profile", "Marine Capabilities", "Past Experience in Similar Projects" (which emphasizes the experience of personnel proposed by SWTS as opposed to SWTS's experience as a firm) and "Experience in Naval Warship Design and Integration". However, nowhere in these references does SWTS claim that its experience in the CFAV *Quest* Mid-Life Refit Project is submitted in satisfaction of subparagraph 1.3a) of Section C of the RFP. In particular, the Tribunal notes that the above references do not amount to a claim by SWTS that its work experience on the CFAV *Quest* satisfies the requirement.

In fact, the Department indicated that an independent review of documents in its possession, principally the Marystown purchase order, served as the basis for the Department and DND to conclude that SWTS's proposal met the requirement.[16] Given that the Marystown purchase order was not part of SWTS's proposal, it is the Tribunal's opinion that the Department was not at liberty to consider that information in evaluating SWTS's proposal. The Department has argued that the above evidence only constituted a clarification of SWTS's proposal that it was authorized to clarify on its own and that, although SWTS's references to the CFAV *Quest* Mid-Life Refit Project are found in its proposal under headings other than the one addressing mandatory subparagraph 1.3a) of Section C of the RFP, this should not prevent the Department from evaluating this information under that requirement.[17] The Tribunal has a number of difficulties accepting these arguments.

The Tribunal is of the view that the RFP and the Handbook made it clear that the evaluation of proposals would be restricted to the contents of proposals, as might be clarified by bidders. The Department, therefore, was not allowed, on its own authority, to clarify SWTS's proposal, let alone repair it, especially with respect to compliance with a mandatory requirement. As well, the Tribunal is of the view that, in evaluating certain information of SWTS's proposal outside the context in which this information was submitted, the Department and DND, in fact, unilaterally changed or supplemented SWTS's proposal.

The Tribunal is of the view that, as SWTS's proposal did not, at the time of bid closing, include the evidence required by subparagraph 1.3a) of Section C of the RFP, the Department and DND acted

16. Department's response in relation to MIL and Fleetway's comments on the GIR dated February 15, 2000, paras. 3, I.2, 4 and 7; III. 21, 23; and V.31.
17. Department's response in relation to MIL and Fleetway's comments on the GIR dated February 15, 2000, paras. I.6 and V.32.

improperly by introducing and relying on additional information not provided in SWTS's proposal and, on this basis, declaring the proposal responsive. Section C of the RFP is clear as to the consequences to proposals not providing sufficient evidence. SWTS's proposal should have been declared nonresponsive on that basis alone.

The Tribunal considers, insofar as the Department might have relied, in part, on SWTS's letter of February 17, 1999, including qualification document Nos. 1 and 2 to declare SWTS's proposal responsive to subparagraph 1.3a) of Section C of the RFP (a point that the Tribunal does not affirm), that qualification document No. 1 details Donelad's experience in managing elements of the CFAV *Quest* Mid-Life Refit Project, not SWTS's own experience, and that qualification document No. 2 relates to the personnel requirements set out in subparagraph 1.3a) of Section C of the RFP. As such, in the Tribunal's opinion, the information does not constitute sufficient evidence to qualify SWTS's proposal under subparagraph 1.3a) of Section C of the RFP.

The Tribunal further notes that the parties have made extensive submissions as to how the experience claimed in proposals should be evaluated, i.e. whether only the experience gained by a bidder itself would be acceptable or whether the experience of the personnel proposed by bidders or their subcontractors could also be considered. Given the above finding, it is not necessary for the Tribunal to determine whether, for example, the experience under the rated requirements in the RFP had to be evaluated in the same manner as the experience offered in satisfaction of subparagraph 1.3a) of Section C of the RFP. It is sufficient to say that, for purposes of this determination, based on the plain reading of subparagraph 1.3a) of Section C of the RFP, only the experience of the bidder itself was acceptable to satisfy that requirement. Given the above conclusions, the Tribunal will not determine whether the substantive contents of the Marystown purchase order amounted to experience in engineering support and technical data management services of the kind, magnitude and complexity of those described in subparagraph 1.3a) of Section C of the RFP.

Evaluation Methodology

With respect to the alleged modification of the evaluation methodology in the Handbook, in the Tribunal's opinion, the facts are clear and simple. The Department set out, in the RFP under Section C, a detailed evaluation scheme that was described in greater detail in Annex H to the RFP. The evaluation scheme provided that, to be considered technically compliant, the score for rated requirements had to be at least 60 percent in each of the eight categories of the rated requirements and had to be at least 70 percent overall. After the RFP was issued but before bid closing, the Department and DND developed the Handbook. The Handbook, at paragraph 10, introduces a "pass/fail" notion into the evaluation of rated requirements, which is nowhere to be found in the RFP. MIL and Fleetway submitted that the introduction of a "pass/fail" notion is at odds with the evaluation scheme described in the RFP and that, in compressing all scores into a 0.3 to 0.8 range for an individual category of rated requirements and a 0.35 to 0.85 range overall, the Department skewed the evaluation methodology in favour of less experienced bidders. For its part, the Department submitted that the "pass/fail" approach described in the Handbook is consistent with the evaluation methodology set out in the RFP and was designed to minimize the influence of subjectivity in assessing proposals.

The Tribunal finds that the Handbook significantly altered the evaluation methodology set out in the RFP. This is a breach of Article 506(6) of the AIT, which requires that tender documents clearly identify the methods of weighting and evaluating the evaluation criteria and that such a clearly stated methodology be used in the evaluation of proposals. In the Tribunal's opinion, the Handbook introduced an evaluation and weighting methodology that could not be anticipated or derived from the methodology set out in the RFP.

Because, in the circumstances, bidders could not reasonably expect such an evaluation approach, it was impossible for bidders to structure their proposals accordingly. Therefore, in the Tribunal's opinion, it was unfair to evaluate proposals against such an unannounced and unexpected evaluation yardstick. Furthermore, the Tribunal is of the view that, by staggering the scores into narrow bands away from both ends of the evaluation scale, i.e. 0.8 for a pass and 0.3 for a fail instead of the anticipated 1.0 for a perfect response and 0.0 for a totally devoid one, the Department has altered the evaluation methodology announced in the RFP in favour of less experienced bidders.

For the above reasons, the Tribunal is of the view that it is impossible to assert with certainty whether any of the proposals would qualify for rated requirements under the evaluation methodology.

Security Clearance

With respect to MIL and Fleetway's allegation that the Department failed to declare SWTS's proposal nonresponsive for failing to meet the security clearance requirements in the LOI and the RFP, the Tribunal finds that there is no basis for this allegation. In the Tribunal's view, there were no security clearance requirements on bidders in the LOI. Paragraph 5 of the LOI made it clear that the security clearance had to be in place prior to contract award. The same paragraph, however, provided that the said security clearance had to be in place no later than six months after the LOI closing date. The Tribunal is of the view that the Department was at liberty to change this term of the LOI when it published the RFP, provided the change was made transparently and in a way that allowed all potential suppliers to react, as appropriate. This was done. Insofar as the RFP is concerned, the Tribunal is satisfied that paragraph 1.5 of Section C is clear and only requires that security clearances be in place prior to contract award. The Tribunal notes that SWTS was issued the requisite security clearance by ISD on August 18, 1999, and that the in-service support contract was issued on October 8, 1999.

Remedy

In recommending the most appropriate remedy, the Tribunal must consider the factors set out in subsection 30.15(3) of the CITT Act. The Tribunal is of the opinion that, because the Department and DND considered and used, in the evaluation of SWTS's proposal, information not included in SWTS's proposal and because the evaluation methodology used was changed significantly without the knowledge of bidders, breaches of key procedural requirements of the AIT have occurred which amount to serious deficiencies in this procurement process. Such deficiencies go to the very foundation, integrity and efficiency of the competitive procurement system and, in the circumstances, caused prejudice to all parties. The Department and SWTS have argued that terminating the contract, which is now near the completion of the transition phase of the contract, would be unfair and prejudicial to their interests. The Tribunal is not oblivious to the fact that contract termination will inconvenience SWTS, the Department and DND. However, MIL and Fleetway's interests must also be taken into consideration and their rights under the AIT preserved. Furthermore, the Tribunal observes that, although the transition phase of the contract is nearing completion, the main body of the in-service support contract (three years plus two option years) has not yet started. As well, the Tribunal is reminded that MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. were the incumbents for this requirement and that, as such, they already possess the knowledge and skills that would generally be acquired during the transition phase of the contract. Therefore, considering all the elements of subsection 30.15(3) of the CITT Act, the Tribunal recommends that the contract awarded to SWTS on October 8, 1999, be terminated in accordance with the provisions of subsection 30.15(2) of the CITT Act and that the Department proceed with this solicitation as recommended below.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements of the AIT 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 Department terminate the contract awarded to SWTS. The Tribunal further recommends that the Department and DND re-evaluate the technical merits of the proposal submitted by MIL/Fleetway and the proposal submitted by Fleetway Inc., in accordance with the evaluation methodology set out in the RFP, and proceed thereon with this procurement as provided for in the RFP and the AIT.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc. their reasonable costs incurred in relation to filing and proceeding with the complaint.

Arthur B. Trudeau
Arthur B. Trudeau
Member