



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-020

Tiree Facility Solutions Inc.

v.

Defence Construction Canada

*Determination and reasons issued
Monday, January 27, 2014*

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IN THE MATTER OF a complaint filed by Tiree Facility Solutions Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

TREE FACILITY SOLUTIONS INC.

Complainant

AND

DEFENCE CONSTRUCTION CANADA

**Government
Institution**

DETERMINATION

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

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Tribunal Member: Serge Fréchette, Presiding Member
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Complainant: Tiree Facility Solutions Inc.
Government Institution: Defence Construction Canada
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STATEMENT OF REASONS

COMPLAINT

1. On November 6, 2013, Tiree Facility Solutions Inc. (Tiree) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. NCR1005) by Defence Construction Canada (DCC) for the provision of professional services specific to the Canadian Forces Housing Agency requirements located at various locations throughout Canada. The objective of the Request for Abbreviated Proposals (RFAP) was to select one firm with whom DCC would establish a standing offer (SO) to provide residential real property strategic advisory services on an “as and when required” basis.
2. Tiree alleged that DCC, in evaluating its bid, used evaluation criteria that were not published or included as part of the RFAP. In particular, Tiree challenged the evaluators’ findings that it was not entitled to the maximum number of points with respect to a mandatory requirement for the bidder to describe comparable projects.
3. According to Tiree, its proposal complied with the mandatory requirements of the solicitation, and it would have obtained full points, had its bid been evaluated in accordance with the published RFAP criteria. Instead, this poor project evaluation resulted in a technical score of Tiree’s proposal that eliminated it from consideration for the SO, and its price proposal was returned unopened.
4. As a remedy, Tiree requests compensation for lost revenues, compensation for its costs in preparing the complaint and changes to DCC’s evaluation criteria and RFAP documents to better describe the project evaluation criteria and scoring.
5. On November 13, 2013, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
6. On November 15, 2013, DCC confirmed to the Tribunal that the SO had been awarded to Altus Group Limited (Altus). Altus applied to the Tribunal, by way of letter dated November 21, 2013, for leave to intervene in this procurement inquiry, pursuant to section 30.17 of the *CITT Act*. This request was granted by the Tribunal on November 21, 2013.
7. On December 9, 2013, DCC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On December 20, 2013, Tiree filed comments on the GIR pursuant to rule 104. These comments were distributed to DCC on December 20, 2013, but DCC did not make any further submissions, nor did Altus.
8. Neither party requested that a hearing be held. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing pursuant to subrule 105(1) of the *Rules* was not required and, according to paragraph 25(c), disposed of the complaint on the basis of written submissions.

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

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

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

PROCUREMENT PROCESS

9. On August 9, 2013, DCC issued the RFAP for residential real property strategic advisory services. The objective of the RFAP was to select one firm with whom DCC would establish an SO to provide services to the Canadian Forces Housing Agency on an “as and when required” basis at various locations across Canada, for a period of three years, with an option to extend the SO for an additional year. The total possible value of the SO was \$850,000.

10. Tiree submitted its proposal on September 18, 2013, and on October 16, 2013, DCC notified Tiree of the results of its evaluation of the proposals received. On October 21, 2013, Tiree raised an objection with DCC and requested a formal review of the scoring. On October 28, 2013, DCC advised Tiree that it had finalized its review of the file and that it would not be making any changes to Tiree’s score as a result of the objection.

11. On November 6, 2013, six working days after receipt of DCC’s correspondence indicating that Tiree’s evaluation would remain unchanged, Tiree filed this complaint with the Tribunal.

TRIBUNAL’S ANALYSIS

12. Section 30.14 of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint and, at the conclusion of the inquiry, determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed.

13. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *North American Free Trade Agreement*,⁴ the *Canada-Chile Free Trade Agreement*,⁵ the *Agreement on Government Procurement*,⁶ the *Canada-Peru Free Trade Agreement*,⁷ the *Canada-Panama Free Trade Agreement*,⁸ the *Canada-Colombia Free Trade Agreement*⁹ and the *Agreement on Internal Trade*.¹⁰

4. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA].

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

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

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

8. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013) [CPAFTA].

9. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [CCOFTA].

10. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

14. Article 1013(1)(h) of *NAFTA* provides that tender documents “. . . shall contain all information necessary to permit suppliers to submit responsive tenders . . . [and] . . . shall also include . . . the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders”

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

An entity shall award contracts in accordance with the following:

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

. . .

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

16. Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of the bids and the methods of weighting and evaluating the criteria.”

17. Article XIII(4) of the *AGP* provides that “(a) [t]o be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation . . .” and that “(c) [a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

18. The *CCFTA*, *CPFTA*, *CPAFTA* and *CCOFTA* contain similar provisions.

19. The issue before the Tribunal is whether DCC evaluated Tiree’s proposal in accordance with the requirements set out in the tender documents. The Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluation of proposals.¹¹ The Tribunal will generally only interfere with an evaluation that is unreasonable. In previous determinations, the Tribunal has stated that an evaluation will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.¹²

20. Moreover, the Tribunal will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.¹³

11. *Chamber of Shipping of British Columbia v. Department of Fisheries and Oceans* (24 March 2010), PR-2009-069 (CITT).

12. *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) [*Northern Lights*]; *Joint Venture of BMT Fleet Technology Limited and Notra Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT).

13. *Northern Lights* at paras. 51-52; *Vita-Tech Laboratories Ltd. v. Department of Public Works and Government Services* (18 January 2006), PR-2005-019 (CITT) at para. 40; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT); *Tetra Tech WEI Inc.* (5 December 2012), PR-2012-031 (CITT) at para. 15.

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

22. Section 2.1 of the RFAP contains a glossary of terms. Specifically, the following terms are defined:

- 2.1.1 *Consultant Team* The team of consultant firms, including the *Proponent* and all its sub-consultants, specialist firms and other firms proposed by the *Proponent* to perform the services required.
- 2.1.2 *Key Personnel* The *Consultant Team* personnel whose roles and responsibilities are critical to the completion of the scope of work. They are individuals who have a direct and substantive involvement in the execution of the work.
- 2.1.3 *Proponent* The *Prime Consultant* entity who submits a proposal.
- 2.1.4 *Consultant* The party that will be identified in the resulting SO agreement.

23. Section 2.2 of the RFAP is titled "**Mandatory and Advisory Clauses**" and provides as follows:

- 2.2.1 Mandatory clauses during the procurement are those containing the words "**must**", "**will**" or "**shall**". These clauses must be observed at all times, unless otherwise authorized by DCC. *Proponents* not respecting these clauses will be disqualified and their submissions will not receive any further consideration.
- 2.2.2 Advisory clauses are those containing the words "may" or "should". *Proponents* not respecting these clauses may be scored lower.

24. The technical criteria required to be met in the submissions are set out in section 5 of the RFAP. In particular, this section provides as follows:

- 5.1.1. The *Proponent's* technical score will represent 90% of the overall score for the *Proponent's* submission. The submissions will be assessed on the merits of the information presented in accordance with the criteria and weight factors indicated in **Figure 1**.

25. Further, the submissions were to be assessed and points awarded using the following rating scale, as presented in the RFAP:

Rating	Definition	Description
3	Excellent	Very good or excellent response
2	Acceptable	Response that generally meets the requirements
1	Weak	Response is poor; missing key information
0	Non-Responsive	No response provided

26. It is the evaluation of its response to section 5.3 of the RFAP with which Tiree takes issue. Section 5.3 provides as follows:

5.3 ***Consultant Team Comparable Projects***
Form Provided

- 5.3.1 The *Proponent* is to demonstrate that the *Consultant Team* has the necessary experience to carry out the assignments that may be required under this SO.
- 5.3.2 In 1 page per project, list and briefly describe a maximum of two (2) projects carried out by the *Consultant Team*. (If the project was undertaken by a firm other than the *Proponent*, indicate the name of the firm and the *Proponent's* relationship

to that firm.) Projects should be recent, comparable in size and scope to this Standing Offer's commissions and should highlight the *Consultant's Team* capabilities as follows:

- Project # 1 – Residential Real Property Policy and Strategic Planning
 - Project # 2 – Residential Market Analysis
- 5.3.3 More recent and relevant experience in terms of functional requirements, size, scale and scope will score higher.
- 5.3.4 Projects are to be presented numbered from 1 to 2 and should demonstrate:
1. The *Consultant* fees and completion dates.
 2. The relevance of the project presented to this SO requirements.
 3. The degree of responsibility of the *Proponent* (e.g. Prime vs. Sub-Consultant). If a project was carried out under Joint Venture, the Joint Venture partners should be identified and the degree of responsibility assigned to the *Consultant Team* member should be indicated.
 4. Name, address and telephone numbers of client contacts for the project.

27. The comparable projects submitted by Tiree, in response to section 5.3.1 of the RFAP, were two separate projects led by its key personnel while those individuals were in the employ of other firms. At the time that it assessed the proposals, DCC awarded Tiree a lower score because the projects that it identified and described in its proposal had not been carried out by Tiree itself.

28. Tiree formally requested that DCC review its scoring, on the basis of the presumption that its low technical score was the result of DCC taking the same approach as had been taken in another procurement (Solicitation No. NCR 1007) for which Tiree had also filed a complaint with the Tribunal.¹⁴ In Solicitation No. NCR 1007, DCC took the approach that the comparable projects provided by Tiree were not entitled to full marks because the projects were those that had been led by Tiree's personnel, but with which Tiree had not been involved, and thus had not been carried out by the *Consultant Team*, in accordance with the requirement in the RFAP.

29. DCC maintained its assessment after considering Tiree's objection. However, DCC now claims that Tiree should not have received any points for its response to section 5.3 of the RFAP. Instead, DCC submits that Tiree should have received a score of zero on each of the two projects that it submitted to demonstrate the experience of the proposed *Consultant Team* because the response did not demonstrate that the *Proponent* possessed any relevant experience. While the projects identified had been led by two of Tiree's *Key Personnel*, DCC essentially argues that there is a distinction between these *Key Personnel* and the *Consultant Team*. While Tiree's *Key Personnel* may have been actively engaged in these projects, there is no relationship between the firms that were ultimately responsible for those projects and Tiree.

30. Tiree points to DCC's changed position as affirming its assertion that the evaluation criteria contained with section 5.3 of the RFAP were not clear, either to bidders or to DCC in its own review of Tiree's assessment. According to Tiree, nowhere is it stated in the RFAP that the relevant experience being

14. The Tribunal notes that Solicitation No. NCR 1007, to which Tiree referred in its correspondence with DCC, was found by the Tribunal to be of a monetary value that was below the necessary thresholds set out in the various applicable trade agreements and that, thus, the Tribunal was without jurisdiction to conduct an inquiry. *Tiree Facility Solutions Inc. v. Defence Construction Canada* (19 November 2013), PR-2013-018 (CITT).

sought was that of the firm or of the bidder or that firm experience would score higher than the experience of team members.

31. In this respect, the Tribunal notes that the term *Consultant Team* is defined in section 2.1.1 of the RFAP as meaning “[t]he team of consultant **firms**, including the *Proponent* and all its sub-consultants, specialist **firms** and other **firms** proposed by the *Proponent* to perform the services required” [bold added for emphasis]. This definition clearly focuses on firms and makes no reference to the individuals who might be employed by each of those firms. Those individuals are instead included within the scope of the term *Key Personnel* in section 2.1.1.

32. The Tribunal notes that section 5.3.1 of the RFAP requires the *Proponent* to demonstrate that the *Consultant Team* has the necessary experience to carry out the type of work that would be required under the SO. Moreover, section 5.3.2 specifically requires bidders to list and briefly describe two projects carried out by the *Consultant Team*.

33. While the *Consultant Team*, as a practical matter, will no doubt employ a number of individuals whose responsibilities will include performing the services required under the resulting SO, it would be incorrect to equate the identity of a firm with the identity of a particular employee of that firm, particularly because *Consultant Team* and *Key Personnel* are assigned distinct meanings under the RFAP.

34. As a matter of law, a contract is performed by the party that is bound by its terms, in this case, necessarily the entity that performed similar projects for the supply of residential real property strategic advisory services. While an employee fulfills contractual obligations towards the employer, an employee does not, in law, perform the contracts entered into by the employer. Put another way, the fact that a firm hires an employee to assist it in discharging its obligations under a contract does not qualify the employee to report having performed the contract.

35. Moreover, according to section 5.3.2 of the RFAP, if the project described was undertaken by a firm other than the *Proponent*, bidders were to indicate the name of the firm and the *Proponent's* relationship to that firm. While the name of the firm is indicated in Tiree's proposal, and Tiree's relationship to its employees who were previously employed by those firms is also indicated, the proposal contains no indication that there is a relationship between those firms, of which the employees were a part, and Tiree.

36. In considering whether the comparable projects required firm experience, the Tribunal also has regard to section 5.3.4 of the RFAP which requires bidders to indicate, in their description of comparable projects, the *Proponent's* degree of responsibility for the project. In this case, Tiree had no responsibility for the projects identified, as they were not projects with which it was involved.

37. In the Tribunal's view, while the RFAP could have been drafted more clearly, a reasonable interpretation of the definitions in section 2.1.1 of the RFAP and the specific terminology used in sections 5.3.1, 5.3.2 and 5.3.4 lends itself to the conclusion that the experience sought by DCC in the RFAP was experience by Tiree, rather than that of its employees.

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

DETERMINATION OF THE TRIBUNAL

39. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. No costs shall be awarded to either party.

Serge Fréchette
Serge Fréchette
Presiding Member