Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-011

eVision Inc., SoftSim Technologies Inc., in Joint Venture

v.

Privy Council Office

Determination and reasons issued Thursday, August 22, 2019

Canada

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IN THE MATTER OF a complaint filed by eVision Inc., SoftSim Technologies Inc., in Joint Venture, 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

EVISION INC., SOFTSIM TECHNOLOGIES INC., IN JOINT VENTURE **Complainant**

AND

THE PRIVY COUNCIL OFFICE **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 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 eVision Inc., SoftSim Technologies Inc., in Joint Venture, be compensated for its lost opportunity by an amount equal to one-half of the profit that it would reasonably have earned, had it been the successful bidder.

The amount of compensation is to be negotiated between the parties. The parties will provide the Canadian International Trade Tribunal, within 30 days of the date of this determination, a report on the outcome of the negotiations.

If the parties are unable to agree on the amount of compensation by this time, the complainant shall file, within 40 days of the date of this determination, with the Canadian International Trade Tribunal a submission on the issue of compensation. The respondent will have seven working days after the receipt of the complainant's submission to file a response with the Canadian International Trade Tribunal. The complainant will have five working days after the receipt of the respondent's reply submission to file any additional comments.

The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of compensation.

Each party will bear its own costs.

Rose Ann Ritcey
Rose Ann Ritcey
Presiding Member

Tribunal Panel:	Rose Ann Ritcey, Presiding Member
Support Staff:	Eric Wildhaber, Counsel Heidi Lee, Counsel
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STATEMENT OF REASONS

1. This inquiry concerns a complaint filed by eVision Inc., SoftSim Technologies Inc., in Joint Venture (hereinafter "SoftSim") regarding a Request for Services (regarding contract No. 20182430/A) issued by the Privy Council Office (PCO) against a Supply Arrangement for Temporary Help Services (No. EN578-0605022) for a Senior Special Advisor (the second RFS).

2. The Tribunal accepted the complaint for inquiry pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*[1] and in accordance with the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[2]

3. The Tribunal conducted an inquiry into the validity of the complaint as required by sections 30.13 to 30.15 of the *Act*. For the reasons that follow, the Tribunal finds that the complaint is valid.

SUMMARY OF THE COMPLAINT

4. The RFS at issue in this complaint is a second version of a request for services for the same requirement. PCO cancelled the first version to correct inconsistencies in the selection methodology and informed both companies that had bid, including SoftSim, that they would have the opportunity to submit new bids. However, PCO failed to transmit the second RFS to SoftSim. The second RFS subsequently closed and the contract was awarded to another bidder before SoftSim or PCO were aware of the mistake.

5. SoftSim claims that PCO's error deprived it of a fair opportunity to compete and that PCO was biased in favour of the winning bidder. As a remedy, SoftSim requests that the solicitation be retendered or that it be allowed to resubmit its bid in response to the second RFP.

PROCEDURAL BACKGROUND

6. PCO issued the first request for services on February 14, 2019, and received two bids in response, including one from SoftSim. The tender period ended on February 20, 2019.

7. On February 26, 2019, PCO cancelled the first version of the RFS to correct inconsistencies in the selection methodology in the "Basis of Selection" section. (PCO only became aware of these inconsistencies at the time of the consensus meeting.) Specifically, the subtitle of this section provided that the lowest-priced compliant response would be selected as the winning bidder, whereas the paragraph text stated that the winning bid would be selected based on the highest combined rating of technical merit and price, without setting out a methodology or formula to combine the scores.

8. On February 27, 2019, PCO contacted SoftSim and the other bidder by telephone to inform them that a new solicitation with a revised selection methodology would be issued. PCO informed both bidders that they would have the opportunity to submit a new bid.

9. On February 28, 2019, PCO issued the second RFS, which clarified that the winning bid would be selected based on the highest combined rating of technical merit and price, and set out the formulas by which scores would be calculated. PCO emailed the second RFS to the two bidders, but entered an incorrect

1. R.S.C., 1985, c. 47 (4th Supp.) [*Act*].
2. S.O.R/93-602 [*Regulations*].

email address for SoftSim.[3] As a result, SoftSim did not receive the second RFS. PCO concedes that it received an automatic undeliverable notice, but did not see it at the time.

10. The RFS closed on March 5, 2019, and a contract was awarded to the other bidder.

11. On March 29, 2019, SoftSim emailed PCO to follow up on the second RFS and requested an update on the procurement process. In this email, SoftSim also stated: "My understanding was that you will send us instruction/changes in bid selection allowing us to resubmit our financial bid. Nonetheless, we will stick to our proposed pricing."

12. When PCO responded that same day by forwarding the email of February 28, 2019, SoftSim identified the error and made an objection to PCO. In doing so, SoftSim requested that PCO remedy the situation.

13. On May 7, 2019, PCO informed SoftSim that it had evaluated SoftSim's bid under the criteria of the second RFS, based on SoftSim's email of March 29, 2019, and concluded that SoftSim would not have been the winning bidder under the second RFS. PCO rejected SoftSim's objection on the basis that the outcome of the second RFS would have been unchanged.

14. On May 16, 2019, SoftSim filed the present complaint with the Tribunal.

Other procedural matters: SoftSim's designations of confidentiality

15. SoftSim filed a number of documents in this complaint and initially designated all but two as "Confidential" or "Protected".[4] SoftSim did not file any explanations justifying the designations, or public versions or summaries, as required under section 46 of the *Act* and Rule 15 of the *Canadian International Trade Tribunal Rules*.[5]

16. On May 24, 2019, the Tribunal directed SoftSim to file the required information with respect to all designated documents by no later than May 31, 2019. When SoftSim failed to do so, the Tribunal sent a second letter on June 4, 2019, directing SoftSim to file the required information without delay. SoftSim did not respond to this correspondence.

17. On June 25, 2019, pursuant to subsection 47(2) of the *Act*, the Tribunal notified SoftSim that none of the documents designated as "Confidential" or "Protected" warranted a confidential designation, with the exception of SoftSim's bid price, as the information contained therein did not pertain to business proprietary information or to any other information that is confidential to SoftSim. The Tribunal also notified SoftSim that it was still not in compliance with paragraph 46(1)(b) of the *Act* as it had failed to submit any of the information required under that provision. The Tribunal informed SoftSim that it was required to comply with subsection 46(1) of the *Act* or withdraw the designations by no later than July 10, 2019, and should it fail to do so, the Tribunal would no longer take into consideration any information contained in documents not properly addressed.

18. On June 28, 2019, SoftSim withdrew the confidentiality designations for two documents.

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3. PCO incorrectly entered SoftSim's email address as "@softsims.ca", rather than the correct "@softsim.ca".
4. The Tribunal notes that while "Protected" is not a designation under the Tribunal's confidentiality framework, the Tribunal nevertheless treated such designations as designations of confidentiality.
5. S.O.R./91-499 [*Rules*].

19. On July 4, 2019, the Tribunal confirmed the withdrawal, but noted that there remained a significant number of documents that SoftSim had not yet addressed. Later that day, SoftSim withdrew the confidentiality designations on all documents, except those with respect to its bid price.

20. On July 17, 2019, pursuant to subsection 48(3) of the *Act*, the Tribunal notified SoftSim that it was still not in compliance with paragraph 46(1)(b) of the *Act*, as it had not submitted the public versions of the documents containing its confidential bid price. It directed SoftSim to identify all documents containing its confidential bid price and to provide public versions of any such documents by no later than July 25, 2019. The Tribunal noted that should SoftSim fail to comply, the confidential information would not be taken into account for these proceedings.

21. SoftSim did not respond to the Tribunal's letter.

22. On August 6, 2019, the Tribunal informed the parties that the inquiry would be extended to 135 days due to SoftSim's failure to comply with directions of the Tribunal. The Tribunal also extended the deadline for SoftSim to comply with the directions set out in the Tribunal's letter of July 17, 2019, to August 14, 2019.

23. On August 7, 2019, SoftSim informed the Tribunal that the names and information of SoftSim's proposed resources were also confidential. Softsim submitted redacted public versions of its confidential documents in accordance with this position; however, in one public version Softsim redacted additional information. It also did not provide public versions of seven documents comprising the curricula vitae and credentials of its resources.

24. The Tribunal notes that SoftSim did not provide an explanation as to why this information is confidential, nor why it failed to raise the matter in response to the Tribunal's letter of June 25, 2019. Nevertheless, the Tribunal recognizes that curricula vitae and personal information are typically considered confidential, as set out in the Tribunal's *Confidentiality Guidelines*. As such, despite SoftSim's failure to provide an explanation, the Tribunal accepts that, in addition to the bid price, the names and information of SoftSim's resources are confidential. The Tribunal also notes that the redactions that go beyond the confidentiality designations are immaterial to the present complaint. Therefore, given the circumstances of this case, in the interests of efficiency and economy, the Tribunal accepts the redactions.

TRADE AGREEMENTS

25. The applicable trade agreements to this solicitation are the *North American Free Trade Agreement*[6] and the *Canadian Free Trade Agreement*,[7] the relevant provisions of which are as follows:

CFTA

Article 502: General Principles

> 1. Each Party shall provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.

6. *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].
7. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2017/07/CFTA-Consolidated-Text-Final-Print-Text-English.pdf> (entered into force 1 July 2017) [CFTA].

. . .

Article 503: General Procurement Rules

. . .

5. Except as otherwise provided in this Chapter . . . the following is an illustrative list of practices that are considered to be inconsistent with Articles 502.1 . . . :

. . .

(g) providing information to one supplier in order to give that supplier an advantage over other suppliers;

. . .

Article 509: Technical Specifications and Tender Documentation

. . .

7. A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. . . .

. . .

Article 515: Treatment of Tenders and Award of Contracts

Treatment of Tenders

1. A procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.

. . .

NAFTA

Article 1008: Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are:

(a) applied in a non-discriminatory manner;

. . .

2. In this regard, each Party shall ensure that its entities:

(a) do not provide to any supplier information with regards to a specific procurement in a manner that would have the effect of precluding competition;

. . .

POSITIONS OF THE PARTIES

SoftSim

26. SoftSim submits that it was denied a fair opportunity to participate in the solicitation due to PCO's error. SoftSim also submits that PCO's evaluation of its bid under the criteria of the second RFS was not legitimate. It argues that had it had the opportunity to view the terms of the second RFS, it would not have submitted the same bid.

27. SoftSim also alleges that PCO's error demonstrates PCO's bias toward the winning bidder. Specifically, SoftSim claims that, as it would have won the contract under the first request for services (as the lowest compliant bidder), PCO purposefully changed the selection methodology in order to favour the winning bidder, and purposefully failed to transmit the second RFS to SoftSim.

PCO

28. PCO concedes that the second RFS was not issued properly to SoftSim, and that it missed an automatic undeliverable notice in its email inbox. However, it submits that this was an inadvertent error that was simply detected too late.

29. Although PCO admits the error, it submits that no remedy is appropriate in the circumstances. PCO argues that it properly relied on SoftSim's email of March 29, 2019, in which SoftSim noted that it would "stick to [its] proposed pricing", to evaluate SoftSim's bid against the second RFS and determine that SoftSim would not have won the contract under the second RFS.

ANALYSIS

30. At the outset, the Tribunal will address SoftSim's allegations of bias on the part of PCO. There is no question that a duty of fairness applies to the tendering process for federal government procurement contracts, and it is well established that a litigant is only required to establish a reasonable apprehension of bias in order to impugn the validity of administrative action to which a duty of fairness applies, such that a decision may be set aside.[8] In order to determine whether a reasonable apprehension of bias exists, the Tribunal must consider what an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude.[9] Based on the evidence, the Tribunal finds that SoftSim has not met this test.

31. The Tribunal notes that the first version of the request for services provided no clear selection methodology, and as such there is no basis on which to conclude that SoftSim would have won the contract under that version. SoftSim also submitted no other evidence to support its claim that it would have done so. In addition, there is no evidence to support SoftSim's claim that the manner in which PCO amended the selection methodology in the second RFS favoured the other bidder.

32. Furthermore, there is no evidence to otherwise demonstrate that PCO purposefully withheld the second RFS from SoftSim. The Tribunal accepts PCO's submission that its failure to transmit the second RFS to SoftSim was an inadvertent mistake. PCO submits that it received an automatic undeliverable notice, which went unseen. As PCO explained, the notice was sent to a general email inbox that is used and monitored by numerous different users. The Tribunal also notes that PCO has taken measures to prevent this type of error from occurring in the future.

33. Altogether, the Tribunal finds that SoftSim's claim of bias rests merely on speculation. In the Tribunal's view, an informed person, viewing the matter realistically and practically, and having thought the matter through, would therefore not conclude that there is a reasonable apprehension of bias on the part of PCO.

8. See *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 161.
9. *Sunny Jaura d.b.a. Jaura Enterprises* (30 January 2019), PR-2018-058 (CITT) at para 16.

34. Notwithstanding, the Tribunal finds that PCO nevertheless breached its trade agreement obligations under Article 509(7) of the CFTA.

35. On the facts, it is clear that SoftSim was deprived of its ability to participate meaningfully in the procurement process as a direct consequence of PCO's error. After cancelling the first request for services, PCO advised both bidders that it would transmit the second RFS and each bidder would be able to submit a new bid. As a result of PCO's error, SoftSim was unaware that the second RFS had been issued and did not have the opportunity to submit a responsive bid. Furthermore, because SoftSim did not have the opportunity to view the second RFS, the Tribunal finds that SoftSim's email of March 29, 2019, is not a substitute for an actual bid. Accordingly, the Tribunal accords no weight to PCO's later evaluation of SoftSim's bid, or to PCO's conclusion that the outcome of the second RFS would not have changed.

36. The Tribunal also finds that PCO is in breach of Article 1008(2)(a) of NAFTA, which provides that entities shall not provide to any supplier information with regards to a specific procurement in a manner that would have the effect of precluding competition. Although the Tribunal accepts that the failure to transmit the second RFS to SoftSim was an inadvertent mistake, the Tribunal finds that PCO's error had the effect of precluding competition by SoftSim.

37. Accordingly, the Tribunal finds that SoftSim's complaint is valid and will now turn to the matter of remedy.

REMEDY AND COSTS

38. PCO argues that no remedy is appropriate in the circumstances as there was no possibility that SoftSim would have been the successful bidder under the second RFS.

39. As the Tribunal concluded above, SoftSim did not have the opportunity to respond to the second RFS. As a result, the Tribunal is unable to determine whether SoftSim would have been, or would not have been, the successful bidder, and therefore the Tribunal is not persuaded by PCO's arguments that no remedy is appropriate in the circumstances.

40. In the alternative, PCO submits that if the Tribunal finds that a remedy is required, the appropriate remedy is compensation for lost opportunity. As noted above, SoftSim requests that the solicitation be retendered or that it be allowed to resubmit its bid in response to the second RFP.

41. To recommend a remedy, the Tribunal must consider all the circumstances relevant to the procurement in question, as set out in subsection 30.15(3) of the *Act*, which include the following: (1) the seriousness of the deficiencies found; (2) the degree to which the complainant and all other interested parties were prejudiced; (3) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced; (4) whether the parties acted in good faith; and (5) the extent to which the contract was performed.

42. The evidence indicates that the breach of the trade agreements found in this case was the result of an inadvertent error, minimizing the prejudice to the integrity and efficiency of the procurement system. There is no evidence that either party acted in bad faith. However, the Tribunal finds that PCO's error significantly prejudiced SoftSim by precluding competition. With respect to contract performance, the Tribunal notes that the contract was awarded on March 13, 2019, and has been substantially performed. The Tribunal accepts PCO's submission that disturbing the contract at this stage would adversely impact the winning bidder and PCO's operational requirement, be inefficient and provide little relief to SoftSim.

43. In light of the foregoing, pursuant to subsection 30.15(2) of the *Act* and in accordance with the Tribunal's *Procurement Compensation Guidelines*, the Tribunal finds that the appropriate remedy is compensation for lost opportunity.

44. In calculating compensation for lost opportunity, the Tribunal typically takes the profits that a complainant would have earned on a contract and divides it by the number of potential bidders. The aim is to quantify the value of the opportunity lost as a result of the government's breach, as opposed to providing a windfall to the complainant. Accordingly, SoftSim should be compensated for its lost opportunity in the amount of the profit it reasonably would have made on this contract, divided by the total number of suppliers, which is, in this case, two.

45. PCO submits that the appropriate profit margin is 10 per cent of the contract value, while SoftSim did not make any submissions in this regard. Accordingly, before allowing further submissions on the amount of compensation, the Tribunal directs the parties to first attempt to negotiate a settlement, as set out below.

46. As neither party requested its costs at any time during the inquiry, the Tribunal declines to award any in this case.[10]

DECISION

47. Pursuant to subsection 30.14(2) of the *Act*, the Tribunal determines that the complaint is valid.

48. Pursuant to subsections 30.15(2) and (3) of the *Act*, the Tribunal recommends that SoftSim should be compensated for its lost opportunity by an amount equal to one-half of the profit that it would reasonably have earned, had it been the successful bidder.

49. The amount of compensation is to be negotiated between the parties. The parties will provide the Tribunal, within 30 days of the date of this determination, a report on the outcome of the negotiations.

50. Should the parties be unable to agree on the amount of compensation by this time, SoftSim shall file with the Tribunal, within 40 days of the date of this determination, a submission on the issue of compensation. PCO will then have seven working days after receipt of SoftSim's submission to file a response. SoftSim will then have five working days after the receipt of PCO's reply submission to file any additional comments. The parties are required to serve each other and file with the Tribunal simultaneously.

51. The Tribunal reserves jurisdiction to establish the final amount of compensation.

Rose Ann Ritcey

Rose Ann Ritcey
Presiding Member

10. See *Exeter v. Attorney General of Canada*, 2013 FCA 134 (CanLII), in which the Federal Court of Appeal held that parties must request their costs in order to be awarded any.