



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2019-057

SoftSim Technologies Inc.

v.

Department of Foreign Affairs,
Trade and Development

*Order issued
Thursday, March 26, 2020*

*Reasons issued
Friday, April 3, 2020*

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IN THE MATTER OF a complaint filed by SoftSim Technologies 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 of the Canadian International Trade Tribunal to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO a motion filed by the Department of Foreign Affairs, Trade and Development on February 28, 2020, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, requesting that the Canadian International Trade Tribunal cease to conduct the inquiry.

BETWEEN

SOFTSIM TECHNOLOGIES INC.

Complainant

AND

**THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND
DEVELOPMENT**

**Government
Institution**

ORDER

The motion filed by the Department of Foreign Affairs, Trade and Development is allowed. Pursuant to subsection 30.13(5) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings related thereto. Each party shall bear its own costs in this matter.

Peter Burn

Peter Burn
Presiding Member

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

OVERVIEW

[1] The present inquiry is the second of two related inquiries into complaints made by SoftSim Technologies Inc. (SoftSim) in which it alleges bias on the part of the Department of Foreign Affairs, Trade and Development (DFATD). While the Canadian International Trade Tribunal's first inquiry is ongoing (File No. PR-2019-053), the Tribunal has decided to cease its second inquiry (File No. PR-2019-057). It has become apparent that SoftSim's bid for the solicitation at issue in the present inquiry was submitted late. For the reasons set out below, the Tribunal is of the opinion that SoftSim's complaint has become trivial and that continuing with the inquiry would serve no useful purpose. This decision does not prevent the Tribunal from considering any overlapping arguments when it determines the validity of SoftSim's first complaint.

BACKGROUND

[2] On February 7, 2020, SoftSim filed a complaint with the Tribunal, pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,¹ concerning a request for proposal (RFP) (Solicitation No. 20-166051) issued by DFATD. The solicitation was for the provision of task-based informatics professional services to contribute to DFATD's trade modernization initiative, specifically for up to four Business System Analysts and one Application/Software Architect.

[3] SoftSim alleged that there were various improprieties in regard to the procurement process. Most notably, it alleged that the evaluation of its bid was not carried out in accordance with the criteria laid out in the RFP and varied significantly from the evaluation of bids it had submitted in response to other RFPs issued by DFATD for similar services. SoftSim also alleged that DFATD was biased against it and had favoured another supplier, Coradix Technology Consulting Ltd. (Coradix).

[4] As a remedy, SoftSim requested that the Tribunal recommend that DFATD re-evaluate the bids and that it compensate SoftSim for its lost profits or lost opportunity to profit. SoftSim also requested that it be awarded its bid preparation and complaint costs.

[5] On February 12 and 13, 2020, the Tribunal informed the parties that the complaint had been accepted for inquiry on February 11, 2020, pursuant to subsection 30.13(1) of the *CITT Act*, 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 February 13, 2020, the Tribunal issued an order, pursuant to subsection 30.13(3) of the *CITT Act*, postponing the award of any contract by DFATD in connection with the solicitation at issue until the Tribunal had determined the validity of the complaint. The Tribunal rescinded that order on February 26, 2020, following notification by DFATD that the contract had been awarded to Coradix on January 17, 2020.³

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

² SOR/93-602 [*Regulations*].

³ Subsection 30.13(3) of the *CITT Act* enables the Tribunal to order a government institution to postpone the awarding of a designated contract that is proposed to be awarded. It naturally follows that the Tribunal cannot issue an order postponing the award of a contract that has already been awarded.

[7] On February 28, 2020, DFATD filed a motion, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*,⁴ requesting that the Tribunal cease to conduct its inquiry on the grounds that SoftSim submitted its bid in response to the RFP after the bid closing deadline and that, since its bid should therefore have been rejected, the complaint is moot.

[8] The Tribunal initially gave SoftSim until March 5, 2020, to respond to DFATD's motion. However, the Tribunal subsequently granted SoftSim's request for an extension until March 10, 2020, to do so.

[9] On March 13, 2020, the Tribunal notified SoftSim that its response to DFATD's motion was late and requested that it either provide its response without delay or confirm that it did not intend to file a response.

[10] On March 17, 2020, having received no response, the Tribunal advised SoftSim that it had set a final deadline of 5:00 p.m. EDT on March 19, 2020, for it to file its response, absent which the Tribunal would decide the motion on the basis of the existing record. On the same day, SoftSim filed its response to DFATD's motion. It took the position that its bid was submitted before the bid closing deadline and that the fact that it was accepted and evaluated by DFATD constitutes proof of such.

[11] On March 20, 2020, DFATD advised the Tribunal that it did not intend to file a reply to SoftSim's response and that it would rely on the submissions and evidence filed with its motion.

POSITIONS OF PARTIES

[12] DFATD submitted that, upon being notified of the complaint, it conducted a review of the solicitation at issue and discovered that it had received SoftSim's bid (via email) after the bid closing deadline of 2:00 p.m. EDT on December 10, 2019. It explained that a request by SoftSim on January 30, 2020 (i.e. after the contract had already been awarded to Coradix), for an update on the solicitation process had prompted DFATD to double-check the Bid Receiving Unit mailbox, which is a generic email address that is monitored only prior to bid closing, to determine whether a bid was received from SoftSim in response to the RFP. DFATD further explained that, failing to notice that SoftSim's bid was late, and thinking that it had accidentally been overlooked, it erroneously proceeded to evaluate the bid but ultimately determined that it was non-compliant.

[13] DFATD submitted that the onus is on the bidder to meet all essential requirements of a procurement, including bid submission requirements, and that the Tribunal has consistently declined to conduct an inquiry into a complaint where a bidder sought to have their late bid accepted.⁵ It submitted that, in doing so, the Tribunal has confirmed that a government institution must reject a late bid unless the delay is attributable to one of the limited exceptions set out in the solicitation documents, none of which it claimed apply in this case. It further submitted that it is incumbent upon the government institution to correct an error in a procurement process once such an error is discovered.⁶

⁴ SOR/91-499.

⁵ DFATD referred to the Tribunal's decisions in 2278089 *Ontario Limited d.b.a. Snap Cab* (13 February 2020), PR-2019-056 (CITT) [*Snap Cab*]; *Corbel Management Corp.* (9 June 2009), PR-2009-009 (CITT); *Headwall Photonics, Inc.* (26 September 2012), PR-2012-017 (CITT); *Hoskin Scientific* (23 January 2014), PR-2013-034 (CITT); *Ex Libris (USA) Inc.* (11 August 2009), PR-2009-034 (CITT); *Promaxis Systems Inc.* (11 January 2006), PR-2005-045 (CITT).

⁶ *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 [*Francis H.V.A.C.*].

[14] DFATD submitted that the evidence demonstrates that SoftSim attempted to submit its bid to DFATD's Bid Receiving Unit mailbox at 1:34 p.m. on December 10, 2019, but through its own error, entered an incorrect email address, which resulted in the bid not being received by DFATD. It indicated that SoftSim's bid was only received by the Bid Receiving Unit mailbox at 2:38 p.m. after SoftSim determined that it had made an error and that its bid had not been received by DFATD prior to the 2:00 p.m. bid-closing deadline. It therefore submitted that, under the terms of the RFP, it was obligated to reject SoftSim's bid.

[15] DFATD submitted that, since SoftSim's bid should have been rejected and that there was no basis for DFATD to proceed with the evaluation, the complaint is moot. It therefore requested that the Tribunal cease to conduct its inquiry pursuant to subsection 30.13(5) of the *CITT Act* and paragraph 10(1)(a) of the *Regulations*, which it claimed provide the Tribunal with the discretion to order the dismissal of a complaint at any time, including where a complaint has no valid basis.

[16] In response to DFATD's motion, SoftSim insisted that its bid was submitted to DFATD on December 10, 2019, at 1:34 p.m., prior to the bid closing deadline. It submitted that, since its bid was received and accepted for evaluation by DFATD, it is now too late for DFATD to claim that it was submitted late. It also alleged that DFATD has a history of not properly monitoring the email inbox where bids are received.

ANALYSIS

[17] For the reasons set out below, the Tribunal has decided to cease its inquiry pursuant to subsection 30.13(5) of the *CITT Act*, on the grounds that the complaint has become trivial. In sum, the Tribunal finds that SoftSim's bid was late, that DFATD should have rejected SoftSim's bid and that continuing with the inquiry would therefore serve no useful purpose. SoftSim's allegations of bias are best dealt with in Tribunal File No. PR-2019-053.

[18] The RFP provided clear instructions in respect of the date, time and manner in which bids had to be submitted to DFATD. The first page of the RFP indicated that bids had to be returned to "receptionsoumission-bidsreceiving.spp@international.gc.ca" by 2:00 p.m. EDT on December 10, 2019.

[19] Section 2.2 of the RFP also provided the following direction:

2.2 SUBMISSION OF BIDS

...

- b. If your bid is transmitted by facsimile or electronic mail, Canada will not be responsible for late bids received at destination after the closing date and time, even if it was submitted before.

Email address for submitting your bid:
receptionsoumission-bidsreceiving.spp@international.gc.ca

Bid Receiving Unit Address is Solely for Delivery of Bids: The above address is for the sole purpose of bid submission. No other communications are to be forwarded to this address.

...

[20] In the Tribunal's view, the evidence on the record establishes that, while SoftSim *attempted* to submit its bid to DFATD at 1:34 p.m. on December 10, 2019, it actually sent its bid to the wrong email address (the address was missing the hyphen or dash between the words "receptionsoumission" and "bidsreceiving"), which resulted in SoftSim receiving an error message from the server indicating that its email was not delivered.⁷ It was not until 2:38 p.m., or 38 minutes past the bid closing deadline, that SoftSim proceeded to send its bid to the correct email address.⁸

[21] The Tribunal has consistently held that a central pillar of the procurement system is the timely receipt of complete bids at the place specified, and in the precise manner stated, in the solicitation documents.⁹ It is also well established that the onus is on the bidder to demonstrate that it meets all essential requirements of a procurement, which includes the requirements regarding bid submission.¹⁰

[22] Section 2.2 of the RFP states that the government is not responsible for bids *received* after the closing date and time, even if an attempt to submit on time was made. Thus, evidence of an attempt, or even an intention, to submit a bid on time is not sufficient. The bid must be received by DFATD prior to the bid closing deadline to be considered timely. In the present case, it is manifest that DFATD received SoftSim's bid at 2:38 p.m. The Tribunal therefore concludes that SoftSim's bid was late.

[23] As a result, SoftSim's bid should have been rejected in accordance with the Standard Instructions that were incorporated by reference into the solicitation by section 2.1 of the RFP.¹¹

[24] The current proceedings revealed that DFATD evaluated SoftSim's bid when it ought not to have. That development is inconsequential because it does not alter the fact that SoftSim's bid was late, and was therefore non-compliant. SoftSim seemingly argues that DFATD's initial decision to evaluate its bid somehow cures the fact that it was late. That argument is wrong. Furthermore, it is incumbent upon a government institution to correct errors, whenever they are discovered.¹² That is what DFATD did by raising the untimeliness of SoftSim's bid in these proceedings.

[25] SoftSim's allegations in regard to the evaluation of its bid consequently have no valid basis. Its allegations in regard to purported bias remain but are essentially identical to those that are made in the context of File No. PR-2019-053, which concerns the procurement of similar services by the same government institution, and are therefore best dealt with in that inquiry.

⁷ Respondent's Motion to Cease Inquiry, Public Exhibit "E". The error message received from the server read as follows: "Your message wasn't delivered to receptionsoumissionbidsreceiving.spp@international.gc.ca because the address couldn't be found, or is unable to receive mail."

⁸ Respondent's Motion to Cease Inquiry, Public Exhibit "D".

⁹ See *Snap Cab* at para. 11 and the cases cited therein.

¹⁰ *Otec Solutions Inc. v. Department of Foreign Affairs, Trade and Development* (5 October 2016), PR-2016-012 (CITT) at para. 28.

¹¹ See 2003 (2019-03-04) Standard Instructions – Goods or Services – Competitive Requirements [*Standard Instructions*], available at <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1>. Section 06 of the instructions provides that bids delivered after the stipulated solicitation closing date and time will be rejected.

¹² *Francis H.V.A.C.* at para. 33; *Telecore v. Department of Public Works and Government Services* (10 October 2017), PR-2017-021 (CITT) at para. 12; *Valcom Consulting Group Inc. v. Department of National Defense* (14 June 2017), PR-2016-056 (CITT) at para. 52.

ORDER

[26] The motion filed by DFATD is allowed. Pursuant to subsection 30.13(5) of the *CITT Act*, the Tribunal hereby ceases its inquiry into the complaint and terminates all proceedings related thereto. Each party shall bear its own costs in this matter.

Peter Burn

Peter Burn
Presiding Member