



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2019-068

SoftSim Technologies Inc.

*Decision made
Wednesday, March 25, 2020*

*Decision issued
Thursday, March 26, 2020*

*Reasons issued
Monday, April 6, 2020*

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

BY

SOFTSIM TECHNOLOGIES INC.

AGAINST

CANADIAN INSTITUTES OF HEALTH RESEARCH

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

SUMMARY OF THE COMPLAINT

[2] The complaint relates to a Request for Proposals (RFP) (Solicitation No. TBIPS-RFP-CIHR-JAVA-01-2020) issued by the Canadian Institutes of Health Research (CIHR) for the provision of one Stream 1 Programmer/Analyst (Level 2) under Task-Based Informatics Professional Services Supply Arrangement No. EN578-170432.

[3] The complainant, SoftSim Technologies Inc. (SoftSim), alleged (1) that the CIHR drafted the solicitation to favour the incumbent; (2) that it incorrectly amended the RFP; and (3) that it improperly found SoftSim's bid non-responsive to mandatory criterion M3. As a remedy, SoftSim requested that the contract award be postponed, that a new solicitation be issued, that the designated contract be terminated, that the designated contract be awarded to SoftSim, and that SoftSim be compensated in an amount specified by the Tribunal. SoftSim also requested the reimbursement of its complaint costs and of its bid preparation costs.

BACKGROUND

[4] The solicitation was issued on January 20, 2020. Among others, mandatory criteria M2 and M3 required as follows:

Programmer / Analyst (Level 2)			
Criteria Number	Mandatory Requirements	Met / Not Met	Location in Bid (page#) & comments
...
M2	<p>The Bidder MUST demonstrate that the proposed resource has a minimum of three (3) years' experience <u>in each</u> of the following technologies developing web applications;</p> <ul style="list-style-type: none"> • J2EE • Struts and Spring Frameworks • JSP • JMS • AJAX • iText • JavaScript 		

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

² SOR/93-602 [*Regulations*].

	<ul style="list-style-type: none"> • Junit • XML • SQL • PL/SQL • Oracle 11g Application/WebLogic Server • Oracle 11g Database. • Web Services (SOAP and RESTful) • OpenId <p>The Bidder MUST provide the following information for each application and system:</p> <ol style="list-style-type: none"> a) Name of the client organization; b) Name of the client reference, telephone number or email; c) A brief description of the role, including scope, deliverables, objectives to be achieved and the results (outcome of the work); and d) Start and end date of the project(s). 		
M3	<p>The Bidder MUST demonstrate that the proposed resource has experience developing web applications using <u>all</u> of the following technologies:</p> <ul style="list-style-type: none"> • Angular • Oauth2 • Hibernate • Java 11 • WebLogic 12C <p>The Bidder MUST provide the following information for each application and systems:</p> <ol style="list-style-type: none"> a) Name of the client organization; b) Name of the client reference, telephone number or email; c) A brief description of the role, including scope, deliverables, objectives to be achieved and the results (outcome of the work); and d) Start and end date of the project(s). 		
...

[5] On January 29, 2020, SoftSim emailed the CIHR to indicate its interest in the solicitation and to state its hope that the evaluation would be fair. SoftSim also stated that “[t]he mandatory and rated criteria have been obviously written for the incumbent MindWire. We ask you to please ease the requirements [to] remove the restrictions that allows [sic] only the incumbent to win.”

[6] On January 30, 2020, the CIHR replied to SoftSim that the solicitation was written in a fair, honest and transparent manner that is in line with the bid solicitation process. The CIHR also asked SoftSim to explain its request to ease the requirements.

[7] SoftSim answered the same day that the way the mandatory and rated criteria were written makes it impossible for anyone other than the incumbent to qualify. Specifically, SoftSim complained of the requirement for three years’ experience in 15 technologies with specific version numbers, in Java 11, and in Oracle version 11g. SoftSim suggested that a candidate be allowed to meet only 75 percent of the required technologies, that it have two to three years’ experience within the last five years with Java, and that Oracle version 11g be replaced with version 9.³

[8] On January 31, 2020, the CIHR replied to SoftSim that it would take its comments under consideration and would respond by February 3, 2020, with a formal amendment. The same day, SoftSim again replied that the solicitation was written for the incumbent, that it copied the incumbent’s resume, and that it is the procurement authority’s responsibility to ensure that its client does not favour any particular supplier.

[9] On February 3, 2020, Amendment 004 was issued.⁴ This amendment provided as follows with regard to mandatory criteria M2 and M3:

Amendment # 004

...

Question 6:

M2:

Would CIHR consider removing some of the technologies?

Answer 6:

CIHR agrees to:

- a) remove OpenID
- b) Modify to be Oracle 11g (**or higher**) Application/WebLogic Server
- c) Modify to be Oracle 11g (**or higher**) Database

Question 7:

M3:

Will CIHR remove Java version 11 and remove some of the other technologies?

³ SoftSim appears to have provided the CIHR with a grid outlining its proposed changes. However, despite repeated requests for all information relevant to the complaint, SoftSim did not file this grid with the Tribunal.

⁴ In all, five amendments were released for this solicitation, but only Amendment 004 is at issue in this case.

Answer 7:

- a) Add OpenId to the list of technologies
- b) Java 11 is replaced by: Java 8 or greater
- c) remove Weblogic 12c

[10] On February 11, 2020, SoftSim emailed the CIHR to, among other things, repeat that the solicitation was drafted to favour the incumbent. SoftSim also filed with the Tribunal a copy of undated text messages which appear to have been exchanged with its candidate around that time, where the candidate stated: “Just to let u know that I spoke with my ex boss at CIHR, and the position is for someone who is already there for 10+ years, so we do not have any chance [*sic*]”.

[11] On February 12, 2020, SoftSim submitted its bid. The solicitation closed on February 13, 2020.

[12] On February 14, 2020, SoftSim wrote to the CIHR’s procurement authority to again ensure the fair evaluation of its bid. SoftSim also alleged that the CIHR’s technical authority threatened SoftSim’s candidate not to bid on the solicitation.

[13] On March 9, 2020, the CIHR advised SoftSim that Mindwire Systems Ltd., the incumbent, was the winning bidder. It also advised SoftSim that its bid was non-compliant with mandatory criterion M3 because the evaluation team could not find any reference to experience in OpenID in its bid. The CIHR nevertheless noted that it had obtained the maximum score on the point-rated criteria.

[14] That same day, SoftSim submitted an incomplete complaint to the Tribunal. It also emailed the CIHR to state that OpenID had been removed from the list of required technologies in Q&A 6 of Amendment 004.

[15] On March 10, 2020, SoftSim wrote to the CIHR’s procurement authority to reiterate that the technical authority asked SoftSim’s candidate not to bid on the solicitation.

[16] Between March 10 and 19, 2020, SoftSim filed additional documents with the Tribunal in response to the Tribunal’s repeated requests, and the complaint was ultimately properly filed on March 19, 2020.

ANALYSIS

[17] On March 25, 2020, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint for the reasons that follow.

Timeliness

[18] Firstly, the Tribunal finds that the first two grounds of complaint are time-barred. Subsection 6(1) of the *Regulations* requires a complainant to file a complaint with the Tribunal within 10 working days of the day on which the basis of a complaint became known or reasonably should have become known. Subsection 6(2) of the *Regulations* requires a complainant who has objected to a government institution to file its complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge that the government institution has denied relief.

[19] Furthermore, the Tribunal has repeatedly stated that bidders bear the onus to “keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.”⁵ It is up to the bidder to make sure to consider any issues in a solicitation and to file any complaint in a timely manner.

[20] Based on the timeline above, SoftSim should have known sometime between February 3 and 13, 2020 – over one month before it properly filed its complaint with the Tribunal on March 19, 2020 – of its first two grounds of complaint and, in the case of the first ground, that the government institution would not provide relief.

[21] With regard to the first ground of complaint, SoftSim first complained to the CIHR that the solicitation was drafted to favour the incumbent between January 29 and 31, 2020. The CIHR issued Amendment 004 on February 3, 2020, to address this complaint. Although SoftSim subsequently reiterated this ground of complaint to the CIHR, it should have realized that its concerns would not be further addressed at the latest on the day the solicitation closed, namely, February 13, 2020. It should not have waited until the award of the contract to the incumbent, which SoftSim stated “proved its suspicion”, to raise this ground of complaint with the Tribunal.⁶

[22] SoftSim should have known of the second ground of complaint following the release of Amendment 004 on February 3, 2020. In its complaint to the Tribunal, SoftSim submitted that the CIHR violated the provisions of the *World Trade Organization Agreement on Government Procurement*⁷ by failing to provide an updated grid for the mandatory criteria and by providing conflicting information in Amendment 004. SoftSim more specifically argued that it was confusing for the CIHR to remove the OpenID requirement from mandatory criterion M2 in Q&A 6 and then add it to mandatory criterion M3 in Q&A 7, particularly as Question 7 asked whether certain technologies could be *removed* from the solicitation. However, SoftSim did not raise any questions with the interpretation of the changes to mandatory criterion M3 in Amendment 004 until it was notified that it would not be awarded a contract on March 9, 2020.

[23] Accordingly, SoftSim did not file these two grounds of complaint within 10 working days of the day it knew or should have known of its grounds of complaint, or within 10 working days of the government institution’s denial of relief.

⁵ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at para. 20. See also paragraph 2.2.1(a) of the RFP, which states that “[i]t is the Bidder’s responsibility to: a. obtain clarification of the requirements contained in the bid solicitation, if necessary, before submitting a bid”.

⁶ *2040077 Ontario Inc. o/a FDF Group* (27 August 2014), PR-2014-024 (CITT) [*FDF Group*] at para. 14.

⁷ SoftSim cited Article XII(g) and (h) of the original *Agreement on Government Procurement*. The corresponding text of the *Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014) (*WTO-AGP*), can be found in Article X(7)(a) and (c), which provides as follows: “A procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders. Unless already provided in the notice of intended procurement, such documentation shall include a complete description of: a. the procurement, including the nature and the quantity of the goods or services to be procured or, where the quantity is not known, the estimated quantity and any requirements to be fulfilled, including any technical specifications, conformity assessment certification, plans, drawings or instructional materials; . . . c. all evaluation criteria the entity will apply in the awarding of the contract, and, except where price is the sole criterion, the relative importance of such criteria; . . .”

Reasonable indication of breach

[24] Secondly, according to paragraph 7(1)(c) of the *Regulations*, the Tribunal may conduct an inquiry into a complaint if it discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements. In this case, the Tribunal finds that none of SoftSim's grounds of complaint disclose a reasonable indication that the CIHR breached the provisions of the relevant trade agreements.⁸

Ground 1: The solicitation was drafted to favour the incumbent

[25] Even if it had not been late, as examined above, SoftSim's first ground of complaint disclosed no reasonable indication of a breach of the trade agreements. SoftSim provided no evidence supporting its allegation that the solicitation was drafted to favour the incumbent. Rather, Annex 2 – Statement of Work of the RFP indicates that the technical requirements of the RFP are based on the CIHR's current software environment:⁹

8. Technical Environment

ResearchNet is an n-tier J2EE application deployed on Oracle Application Server built using the Struts, Tiles and Spring frameworks. XML is used for data interchange. Oracle 11g is used for the database server. The My Eclipse integrated development environment is used to write source code and Subversion is used for source control. JUnit is used as a testing framework. PDF forms are designed using Nuance and iText libraries.

Funding Decisions Database (FDD) is J2EE web applications using SOLR for faceted searches. SOLR indexes are built against relational data stored in an Oracle 11g database server.

Web Services are utilized to support extended functionality of the systems, in combination with OAuth2 authorization framework.

OpenID is used to implement a SSO between CIHR legacy systems.

[26] SoftSim even acknowledges this, stating as follows on January 30, 2020:

In each criteria, your client specified a list of technologies 15 of them in some case and the proposed candidate must have 3 years of experience in each one of them. That is mission impossible because the only application in planet earth that has these 15 technologies with these exact version numbers exist all together is in the environment of the current CCV/ResearchNet at CIHR [*sic*].

[27] The Tribunal has often stated that a procuring entity is entitled to structure a solicitation, including the technical evaluation criteria, in a manner which fulfills its legitimate operational requirements.¹⁰ In this case, the fact that the CIHR sought experience in the technologies listed in the

⁸ The relevant trade agreements include, among others, the *WTO-AGP*.

⁹ The title page of the solicitation also indicated that the solicitation was “[t]o provide assistance to CIHR’s Solutions Delivery team to develop and program enhancements within CIHR systems, and to ensure that systems are functioning according to documented specifications.”

¹⁰ *Vaisala Oyj v. Department of Public Works and Government Services* (29 December 2017), PR-2017-022 (CITT) at para. 82; *FDF Group* at para. 19; *Accent On Clarity* (13 June 2012), PR-2012-005 (CITT) at para. 20; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-023 (CITT) at paras. 60, 65, 70; *Bajaj Inc.* (7 July 2003), PR-2003-001 (CITT); *Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT).

RFP is understandable and reasonable, and is not indicative of the solicitation having been drafted to favour the incumbent.

[28] Furthermore, it is to be expected that the incumbent would have experience in these technologies, as it had been working in the CIHR's software environment. As previously stated by the Tribunal, incumbency, in and of itself, does not constitute an unfair advantage.¹¹

[29] In the absence of evidence to the contrary, the Tribunal finds that the solicitation was not drafted to favour the incumbent, but rather to answer legitimate operational requirements.

Ground 2: The solicitation was incorrectly amended

[30] Again, even if it had not been late, as examined above, SoftSim's second ground of complaint does not disclose a reasonable indication of a violation of the trade agreements either. The Tribunal finds that the CIHR did not incorrectly amend the solicitation.

[31] The Tribunal notes that there is no requirement in the trade agreements regarding the form that amendments must take. The trade agreements only require that such amendments be communicated to the potential bidders.¹² As such, there was no obligation for the CIHR to release an updated grid to reflect the changes to mandatory criteria M2 and M3 in Amendment 004, Q&A 6 and 7.

[32] In addition, the Tribunal finds that Amendment 004 was clear that OpenID was to be added to the list of required technologies in mandatory criterion M3.¹³ In any event, as noted above, SoftSim failed to follow-up on the matter within the timelines imparted and cannot now ask for the Tribunal to intervene.

Ground 3: SoftSim's bid was improperly found non-responsive to mandatory criterion M3

[33] With respect to SoftSim's third ground of complaint, the Tribunal finds that the CIHR properly found SoftSim's complaint to be non-responsive to mandatory criterion M3. Accordingly, there was no reasonable indication of a breach of the trade agreements.

¹¹ *Le Groupe Conseil Bronson Consulting Group v. Department of Public Works and Government Services* (23 June 2017), PR-2016-058 (CITT) at para. 34; *CAE Inc. v. Department of Public Works and Government Services* (7 September 2004), PR-2004-008 (CITT) at para. 43; *Corel Corporation* (26 October 1998), PR-98-012 and PR-98-014 (CITT); *Array Systems Computing Inc.* (25 March 1996), PR-95-024 (CITT). See also section 18 of the 2003 (2018-05-22) Standard Instructions – Goods or Services – Competitive Requirements, incorporated by reference in section 2.1 of the RFP, which provides in para. 2 that “[t]he experience acquired by a bidder who is providing or has provided the goods and services described in the bid solicitation (or similar goods or services) will not, in itself, be considered by Canada as conferring an unfair advantage or creating a conflict of interest.”

¹² See e.g. Article X(11) of the *WTO-AGP*, which states as follows: “Where, prior to the award of a contract, a procuring entity modifies the criteria or requirements set out in the notice of intended procurement or tender documentation provided to participating suppliers, or amends or reissues a notice or tender documentation, it shall transmit in writing all such modifications or amended or re-issued notice or tender documentation: a. to all suppliers that are participating at the time of the modification, amendment or re-issuance, where such suppliers are known to the entity, and in all other cases, in the same manner as the original information was made available; and b. in adequate time to allow such suppliers to modify and re-submit amended tenders, as appropriate.”

¹³ SoftSim also alleged that the CIHR intended to remove OpenID from mandatory criterion M3 in Q&A 7, but made a typo. However, SoftSim did not provide any evidence that this was indeed a mistake on the CIHR's part. Furthermore, OpenID was not originally part of mandatory criterion M3, such that it would make no sense for the CIHR to attempt to remove it thereunder.

[34] SoftSim argued that it was not open to the CIHR to re-evaluate the mandatory criteria once it had moved on to the evaluation of the point-rated criteria. SoftSim submitted that the fact that the CIHR evaluated SoftSim's point-rated criteria meant that it originally passed the mandatory criteria, because section 4.1.1.2 Point Rated Technical Criteria provides that "[t]he Bidder must have met all of the above mandatory criteria in order to be rated in accordance with the [point-rated] criteria."

[35] SoftSim has made arguments similar to this one in other complaints to the Tribunal (notably in Tribunal File No. PR-2019-057). That argument is unfounded. At all times, it is incumbent upon a government institution to correct errors, whenever they are discovered.¹⁴ That is what the CIHR did through its re-evaluation. The fact that the CIHR mistakenly went on to evaluate the point-rated criteria when it should not have in no way cures SoftSim's failure to meet a mandatory criterion, however late that failure was discovered.

[36] Moreover, the Tribunal has consistently held that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder and that it is therefore incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant in all essential respects.¹⁵

[37] In this case, the requirements of the solicitation were clear: a bid had to meet all mandatory requirements in order to be considered responsive.¹⁶ The onus was therefore on SoftSim to ensure that it met the mandatory criteria, as amended. However, as noted by the CIHR, SoftSim's bid did not refer to any experience in OpenID, and is therefore non-compliant with the amended mandatory criterion M3.

Unsubstantiated allegations

[38] Finally, the Tribunal notes that SoftSim alleged that the incumbent does not have the required experience in OpenID. The Tribunal has consistently held that it requires more than bald allegations to proceed with an inquiry.¹⁷ In this case, SoftSim provided no evidence regarding this allegation, stating only that its candidate "declared that no one at CIHR including the incumbent . . . have any experience with OpenID", and that the "CIHR contracted someone from the US because they were not able to find anyone in Canada that has this experience." Accordingly, such an unsupported allegation does not constitute sufficient evidence for the Tribunal to proceed with an inquiry.

[39] Finally, the Tribunal cautions that complainants ought not make bald unsubstantiated allegations that are geared at casting aspersions on the integrity of procuring entities, or individual public servants. SoftSim showed no restraint in that respect in this matter; its behaviour may have

¹⁴ *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 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.

¹⁵ *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13; *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at para. 28; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 37.

¹⁶ See section 4.1.1.1 and paragraph 4.2.1(a) of the RFP.

¹⁷ See e.g. *Vesey's Seeds Limited, Doing Business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT) at para. 35; *Madsen Diesel & Turbine Inc.* (25 June 2014), PR-2014-018 (CITT) at para. 39.

risen to the level of intimidation or bullying.¹⁸ The Tribunal presumes good faith by all parties. A complainant ought not question the actions of public servants on grounds purporting bad faith or worse unless it is in possession of evidence supported by hard facts. Such evidence was not provided in this instance. In matters that go to full inquiry, the Tribunal has the power to award costs against parties who make such allegations indiscriminately or with recklessness so as to dissuade or negatively sanction such behaviour.

DECISION

[40] Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Peter Burn

Peter Burn
Presiding Member

¹⁸ See e.g. Exhibit PR-2019-068-01, Vol. 1 at 2, 41, 47; Exhibit PR-2019-068-01A, Vol. 1 at 41, 45, 52.