



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2019-053

SoftSim Technologies Inc.

v.

Department of Foreign Affairs,
Trade and Development

*Determination and reasons issued
Thursday, June 11, 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 to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

SOFTSIM TECHNOLOGIES INC.

Complainant

AND

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

**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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Foreign Affairs, Trade and Development its costs in the amount of \$3,500 for responding to the complaint, which costs are to be paid by SoftSim Technologies Inc. The Canadian International Trade Tribunal directs SoftSim Technologies Inc. to take appropriate action to ensure prompt payment.

Peter Burn

Peter Burn

Presiding Member

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| Tribunal Panel: | Peter Burn, Presiding Member |
| Support Staff: | Alain Xatruch, Lead Counsel Zackery Shaver, Counsel Jessye Kilburn, Student-at-Law |
| Complainant: | SoftSim Technologies Inc. |
| Government Institution: | Department of Foreign Affairs, Trade and Development |
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STATEMENT OF REASONS

SUMMARY OF COMPLAINT

[1] The present inquiry is the first of two related inquiries into complaints filed by SoftSim Technologies Inc. (SoftSim) in which it alleged that the Department of Foreign Affairs, Trade and Development (DFATD) had exhibited bias. The Tribunal decided to cease the second inquiry after it became apparent that SoftSim's bid for the solicitation at issue had been submitted late.¹

[2] While certain allegations of bias overlap between the two complaints, the present inquiry is focused on a Request for Proposal (RFP) issued by DFATD, Solicitation No. 20-166067 (the solicitation at issue). The solicitation was for the provision of task-based informatics professional services to contribute to DFATD's trade modernization initiative, specifically for up to five Business System Analysts, Level 3.

[3] SoftSim has asserted that there were various improprieties with 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 the successful bidder, Coradix Technology Consulting (Coradix).

[4] As a remedy, SoftSim requested the Tribunal recommend that DFATD re-evaluate its bid 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] Having determined that the complaint met the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² the Tribunal decided, pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*,³ to conduct an inquiry into the complaint on February 3, 2020.

[6] The Tribunal conducted the inquiry into the validity of the complaint as required by sections 30.14 and 30.15 of the *CITT Act*. For the reasons provided below, the Tribunal finds that the complaint is not valid.

PROCUREMENT PROCESS

[7] On November 25, 2019, DFATD sent the RFP documents by email to the 15 supply arrangement holders that were invited to submit bids, as provided by the Task-based Informatics Professional Services Supply Arrangement.⁴ SoftSim was not invited to submit a bid.

¹ See *SoftSim Technologies Inc. v. Department of Foreign Affairs, Trade and Development* (26 March 2020), PR-2019-057 (CITT).

² SOR./93-602 [*Regulations*].

³ RSC, 1985, c. 47 (4th Supp.) [*CITT Act*].

⁴ Exhibit PR-2019-053-40, Vol. 1 at 101. See Clause 16, Task-based Informatics Professional Services, Public Services and Procurement Canada, online at <<https://www.tpsgc-pwgsc.gc.ca/app-acq/sptb-tbps/am-sa-eng.html#c16>>.

[8] On November 26, 2019, DFATD published the RFP on Buyandsell.gc.ca, the Government of Canada's official procurement information website.⁵ The same day, SoftSim requested an invitation to bid.⁶ SoftSim's request was accepted following verification that it held the required Task-based Informatics Professional Services Supply Arrangement accreditation under Tier 1.⁷ An email inviting SoftSim to bid was also sent the same day.⁸

[9] On December 10, 2019, at 2:00 p.m. EST, the RFP closed.⁹ Three bids were received, including one from Coradix and one from SoftSim.¹⁰

[10] On January 16, 2020, SoftSim received an email from DFATD communicating that it had not been the successful bidder in the solicitation.¹¹ The email included a letter dated January 6, 2020, stating that SoftSim had been disqualified because its candidates had not received the minimum score of 70% on the point-rated criteria of the RFP. The letter also identified the winning bidder as Coradix with a contract award value of \$626,340.¹²

[11] The same day, SoftSim objected to DFATD's assessment that its bid did not meet the minimum score for the point-rated criteria. SoftSim requested that DFATD provide a detailed evaluation report and that it delay the award of the contract until after the matter had been resolved.¹³

[12] On January 21, 2020, DFATD provided SoftSim with a copy of the evaluation report.¹⁴

COMPLAINT PROCEEDINGS

[13] On January 16, 2020, SoftSim submitted its complaint to the Tribunal.

[14] On January 16 and 17, 2020, the Tribunal, pursuant to subsection 30.12(2) of the *CITT Act*, notified SoftSim that additional information and a duly completed complaint form were required before its complaint could be considered to have been filed.¹⁵

[15] On January 17, 20, 23, and 28, 2020, SoftSim provided the Tribunal with the requested information. Accordingly, its complaint was considered to have been filed on January 28, 2020.

[16] On February 5, 2020, the Tribunal informed the parties that it had accepted the complaint for inquiry on February 3, 2020. On the same day, 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

⁵ See "Trade Modernization TBIPS – A.7 Programmer Analyst – Up to five (5) Ms Dynamics (20-166067)", online at <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-19-00897300>>.

⁶ Exhibit PR-2019-053-40, Vol. 1 at 105.

⁷ *Ibid.* at 5 (para. 8).

⁸ *Ibid.* at 104.

⁹ *Ibid.* at 34.

¹⁰ *Ibid.* at 7 (para. 14).

¹¹ *Ibid.* at 130.

¹² *Ibid.* at 131.

¹³ *Ibid.* at 133.

¹⁴ *Ibid.*; Exhibit PR-2019-053-40A (protected), Vol. 2 at 79.

¹⁵ Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, SOR/91-499, provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, the complaint will be considered filed "on the day that the Tribunal receives the information that corrects the deficiencies".

rescinded that order on February 24, 2020, following confirmation from DFATD that the contract had already been awarded to Coradix on January 6, 2020.¹⁶

[17] On February 21, 2020, following a request from DFATD, the Tribunal invited SoftSim and DFATD to file additional affidavit evidence in the present matter, following the same schedule that had already been set out by the Tribunal in File No. PR-2019-057. The Tribunal requested that SoftSim file any additional evidence by February 26, 2020, with DFATD having until March 11, 2020, to file evidence in reply. The Tribunal scheduled a hearing for March 25, 2020, in which the parties could cross-examine affiants.

[18] On March 3, 2020, SoftSim submitted two sworn affidavits. One affidavit was signed by Joanne Plummer, a former contractor with DFATD, and the other was signed by six SoftSim employees. Unsworn copies of the affidavits had previously been filed on February 27, 2020.

[19] On March 11, 2020, DFATD notified the Tribunal that it did not intend to submit any affidavits. On March 13, 2020, the Tribunal requested that DFATD confirm whether it wished to cross-examine SoftSim's affiants at the scheduled hearing. The same day, DFATD confirmed that it did not intend to cross-examine SoftSim's affiants and would address the contents of the affidavits in its Government Institution Report (GIR).

[20] On March 18, 2020, the Tribunal cancelled the hearing scheduled for March 25, 2020.

[21] On March 19, 2020, following repeated warnings regarding its disorderly conduct with respect to the filing of materials, the Tribunal notified SoftSim that, effective immediately, SoftSim would only be allowed to file materials if requested to do so by the Tribunal or after it had received permission to do so by the Tribunal. The Tribunal added that failure to abide by these rules would result in the materials not being placed on the Tribunal's record and being given no further consideration.

[22] On April 8, 2020, DFATD filed its GIR. Included in the GIR was a request that the Tribunal cease its inquiry on the grounds that the complaint was vexatious.

[23] On April 14 and 22, 2020, SoftSim filed its comments on the GIR.

[24] On April 24, 2020, DFATD made a point of clarification regarding one sentence in the GIR, but indicated that it did not otherwise intend to seek leave to file a sur-reply. SoftSim made several additional filings after this date; however, the Tribunal did not consider them as they were not filed in accordance with the special measures imposed on SoftSim on March 19, 2020, which required SoftSim to obtain permission from the Tribunal prior to filing additional materials.

ANALYSIS

[25] Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the

¹⁶ Exhibit PR-2019-053-11, Vol. 1 at 2. 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.

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.

[26] Section 11 of the *Regulations* specifies that the Tribunal must determine whether the procurement was conducted in accordance with the requirements set out in the applicable trade agreements, which, in this instance, includes the *Canadian Free Trade Agreement*.¹⁷

[27] Based on SoftSim's arguments, the Tribunal identified and inquired into the following two grounds of complaint with respect to DFATD's¹⁸ procurement:

- 1) The evaluation of SoftSim's bid did not conform with the criteria as laid out in the RFP and varied significantly from previous bids submitted by SoftSim in response to similar RFPs; and
- 2) DFATD was biased in favour of the successful bidder, Coradix, and against SoftSim.

[28] Additionally, the Tribunal considered DFATD's contention that the Tribunal should exercise its discretion to cease its inquiry on the basis that SoftSim's complaint is vexatious and an abuse of process, as set out in subsection 30.13(5) of the *CITT Act*.¹⁹

(1) DFATD's evaluation of SoftSim's bid was reasonable

[29] SoftSim alleged that the process by which DFATD evaluated its candidates was flawed. It indicated that three of its four candidates were already working on a contract at DFATD under Solicitation No. 19-155898, had garnered positive reviews by their supervisors, and had received near-perfect scores when evaluated for the purposes of that contract.²⁰ The fourth candidate had also been evaluated in Solicitation No. 19-155898. To SoftSim, it is inconceivable that the same candidates would fail to receive passing grades for the solicitation at issue.

Relevant provisions of the RFP

[30] An extract of the mandatory and point-rated criteria of the RFP²¹ for the candidates is included at Annex 1.

¹⁷ Online: Internal Trade Secretariat <https://www.cfta-alec.ca/wp-content/uploads/2020/04/CFTA-Consolidated-Text-Final-English_April-24-2020.pdf> (entered into force 1 July 2017) [*CFTA*]. The Notice of Proposed Procurement published on Buyandsell.gc.ca and section 1.2(d) of the RFP list all of the applicable trade agreements, which include the *CFTA*. For the purposes of this inquiry, the Tribunal will refer to the provisions of the *CFTA*, given that SoftSim is a Canadian supplier. The Tribunal notes that the other applicable trade agreements have provisions that are similar in nature to those of the *CFTA*.

¹⁸ Although SoftSim's complaint generally refers to the government institution as Global Affairs Canada or GAC, the Tribunal has instead used DFATD. The two are the same entity: the legal title is the Department of Foreign Affairs, Trade and Development, while the applied title is Global Affairs Canada. See the Federal Identity Program registry of applied titles, online: <<https://www.tbs-sct.gc.ca/ap/fip-pcim/reg-eng.asp>>.

¹⁹ Exhibit PR-2019-053-40, Vol. 1 at 25 (para 77).

²⁰ Exhibit PR-2019-053-01B, Vol. 1 at 10-11.

²¹ Exhibit PR-2019-053-40, Vol. 1 at 56-60.

Positions of parties

– SoftSim

[31] SoftSim has maintained from the outset that DFATD failed to properly evaluate its bid and that the evaluation criteria provided an unfair advantage to Coradix.²² In its complaint and affidavit, SoftSim suggested that the four candidates it provided had received perfect and near-perfect scores in Solicitation No. 19-155898.²³ In the solicitation at issue, two of these candidates received scores that were near zero, another candidate was not evaluated, and one narrowly missed the pass rate of 70 points.²⁴

[32] SoftSim maintained that it was inconceivable to SoftSim that the three candidates that were scored by DFATD would receive such low scores in this procurement. It submitted that all three candidates were presently working for DFATD in the same role, as Level 3 programmer analysts under Solicitation No. 19-155898, and had received positive feedback from their supervisors.²⁵ It added that, since the three candidates that were evaluated had all been accepted by DFATD as replacements under the contract issued in Solicitation No. 19-155898, they were equivalent to SoftSim's original candidates that had all received top scores in the initial evaluation for that solicitation.²⁶

[33] SoftSim asserted that, apart from the minimum project duration (six months versus three months), most of the criteria that were evaluated in the two procurements were almost identical. According to SoftSim, it was unreasonable for DFATD to change its methods for evaluating procurements that are functionally the same, with the same candidates and in the same roles. It argued that bidders rely on consistency in the evaluation of their bids, particularly when a solicitation involves detailed technical requirements.²⁷

[34] In addition to alleging that the evaluation of its candidates was unreasonable, SoftSim added that DFATD should have requested clarification prior to selecting the three candidates it evaluated, rather than simply picking the first three candidates presented.²⁸ SoftSim suggested that this is precisely why the RFP²⁹ allowed DFATD to request clarification from a bidder.

[35] SoftSim also submitted that its third candidate's Microsoft Dynamics certificate had been included in its original bid documents, but had not been considered by the evaluators.³⁰

– DFATD

[36] In response to SoftSim's allegations, DFATD submitted that its evaluation of SoftSim's bid was reasonable and that, save for some generalized allegations of impropriety, corruption and bias, SoftSim had failed to make any specific arguments that would point to an error in the evaluation to

²² Exhibit PR-2019-053-01B, Vol. 1 at 10-11.

²³ Exhibit PR-2019-053-23B, Vol. 1 at 2-4; Exhibit PR-2019-053-01B, Vol. 1 at 10-11.

²⁴ Exhibit PR-2019-053-23A, Vol. 1 at 30-43.

²⁵ Exhibit PR-2019-053-42 (protected), Vol. 2, Exhibits 5, 6, 7.

²⁶ Exhibit PR-2019-053-23A, Vol. 1 at 30-43.

²⁷ Exhibit PR-2019-053-01B, Vol. 1 at 10-11; Exhibit PR-2019-053-23A, Vol. 1 at 30-43.

²⁸ Exhibit PR-2019-053-42 (protected), Vol. 2 at 2-3.

²⁹ Exhibit PR-2019-053-40, Vol. 1, Exhibit 1 at 51, s. 4.1(c)(i).

³⁰ Exhibit PR-2019-053-42 (protected), Vol. 2 at 2.

which DFATD could respond.³¹ DFATD added that SoftSim had received the evaluators' report from DFATD, but had failed to mention or refer to it in its submissions and had not filed a copy with the Tribunal.³²

[37] As a preliminary matter, DFATD offered that the decision not to accept SoftSim's third candidate's Microsoft Dynamics certificate and the exclusion of SoftSim's fourth candidate were reasonable decisions on the part of the evaluators. DFATD noted that the Microsoft Dynamics certificate included in SoftSim's bid for its third candidate³³ lacked the required Customer Relationship Management (CRM) component and was thus accorded no points for this criterion. With respect to SoftSim's fourth candidate, DFATD explained that, since the RFP only required three resources for evaluation purposes, it only evaluated the first three as listed in the bid.³⁴

[38] DFATD noted that the primary reason it found SoftSim's bid unresponsive was that it lacked the detail necessary to assess its candidates' qualifications. The RFP and the scoring grid were explicit in that it was the bidder's responsibility to explain how each candidate met the point-rated criteria and to reference the page and paragraph where this information was contained in the candidates' résumé.³⁵ The evaluators noted that SoftSim's bid failed to contain this information.

[39] DFATD submitted that bidders were required to demonstrate a proposed resource's experience with a résumé and specific project experience, as the RFP specified that "only listing experience without providing any supporting data to describe responsibilities, duties and relevance to the requirements will not be considered 'demonstrated' for the purpose of this evaluation and will be deemed non-compliant."³⁶ It submitted that each project needed to meet a minimum duration of six months,³⁷ with the possibility of subdividing longer projects, subject to those projects being independently distinguishable and the subdivisions justified.³⁸

[40] With respect to SoftSim's bid, DFATD submitted that the evaluators had reached a consensus that none of the three resources met the minimum score of 70 points. It added that the evaluators noted serious deficiencies in the amount of detail and information provided by SoftSim with respect to how each candidate met the point-rated requirements, including specific examples, dates and projects completed.³⁹

[41] DFATD's final argument on the matter was that the outcomes of evaluations in previous solicitations were irrelevant. It submitted that, while the solicitation at issue shared similar evaluation criteria with Solicitation No. 19-155898, the different candidates, evaluators and contract specifications made objective comparison of the scores meaningless.⁴⁰

[42] DFATD indicated that the Tribunal has in the past refused to compare solicitations even where similarities may exist. It submitted that, in *Accent on Clarity*, the Tribunal declined to take into

³¹ Exhibit PR-2019-053-40, Vol. 1 at 15 (paras. 39-42).

³² *Ibid.*

³³ *Ibid.* at 20 (para. 57). See also DFATD's clarification to the GIR in Exhibit PR-2019-053-43.

³⁴ *Ibid.* at 7-8 (para. 16).

³⁵ *Ibid.* at 16-17 (paras. 43-44).

³⁶ *Ibid.*

³⁷ Exhibit PR-2019-053-40, Vol. 1 at 55 (s. 1.1).

³⁸ Exhibit PR-2019-053-40A (protected), Vol. 2 at 88, 91, 114-116.

³⁹ Exhibit PR-2019-053-40, Vol. 1 at 16-17 (para. 44).

⁴⁰ *Ibid.* at 12-14 (paras. 30-37).

consideration allegations concerning a government entity's action in previous procurements.⁴¹ It added that, in *Samson & Associates*, the Tribunal also declined to consider why a candidate was accepted under a supply arrangement for one posting and then subsequently not considered for a new supply arrangement.⁴²

[43] DFATD further submitted that, while SoftSim may contend that Solicitation No. 19-155898 and the solicitation at issue both concern the procurement of Level 3 programmer analysts, and that some of the candidates were already working for DFATD at this substantive level, only the fourth candidate (who was not evaluated in the solicitation at issue) had been submitted as a candidate in Solicitation No. 19-155898, the other three candidates having all been submitted as additional or replacement resources. This meant that they were not evaluated as part of a competitive bidding process, but rather on the basis of equivalence with respect to the contract that was being executed.⁴³

Tribunal's analysis

[44] The Tribunal has frequently reminded SoftSim that the present inquiry concerns exclusively the solicitation in question, namely, DFATD's Solicitation No. 20-166067. The Tribunal has also made it clear that information provided by SoftSim with respect to other procurements can be considered, but only to the extent that it supports the grounds of complaint accepted for inquiry.⁴⁴ Accordingly, the Tribunal's inquiry with respect to this ground of complaint is restricted to whether the evaluation of SoftSim's bid in the solicitation at issue was reasonable.

[45] One of the central aims of the *CFTA* is to "promote equal economic opportunity for Canadians."⁴⁵ One of the ways in which the *CFTA* promotes equal opportunity is by establishing "a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers."⁴⁶

[46] Article 507.3(b) of the *CFTA* requires that a procuring entity "base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation." Additionally, Articles 515.1 and 515.4 of the *CFTA* provide that a procuring entity is to "treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process" and that, "[t]o be considered for an award, a tender shall . . . at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation"

[47] The reasonableness standard, as it applies to the evaluation of bids, is well established in Tribunal jurisprudence. A reasonable evaluation is one that is supported by a tenable explanation, even if that explanation is not one that the Tribunal itself finds compelling.⁴⁷ The Tribunal has stated

⁴¹ *Accent on Clarity v. Royal Canadian Mounted Police* (15 June 2012), PR-2012-005 (CITT) at para. 20, citing *Winnipeg Audio-Visual Services Inc.* (7 October 2008), PR-2004-011 (CITT).

⁴² *Samson & Associates v. Department of Public Works and Government Services* (28 April 2015), PR-2014-050 (CITT) at para. 37 [*Samson*].

⁴³ Exhibit PR-2019-053-40, Vol. 1 at 12-14 (paras. 32-35).

⁴⁴ Exhibit PR-2019-053-45 at 1.

⁴⁵ *CFTA*, Preamble.

⁴⁶ *CFTA*, Article 500.

⁴⁷ *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) at para. 25. See also *C3 Polymeric Limited v. National Gallery of Canada* (14 February 2013), PR-2012-020 (CITT) at para. 38.

that it will substitute its judgment for that of the evaluators *only* when they 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 manner.⁴⁸

[48] In addition, 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.⁴⁹

[49] In the present case, based upon the evidence tendered and for the reasons provided below, the Tribunal finds that the evaluation of SoftSim's bid was reasonable. The evaluators were justified in finding the bid unresponsive, as SoftSim had not presented its bid in the manner and form specified. The evaluators were thorough in their assessment of SoftSim's bid, providing detailed comments on why SoftSim did not receive full marks for each rated criterion.

[50] SoftSim's bid lacked the detail required to obtain the maximum number of points for each point-rated requirement. The bid preparation instructions in the solicitation documents stated as follows:

[T]he evaluation criteria matrix must be used to answer the mandatory and point[-]rated criteria. Therefore, the answers are to be entered directly into the matrix, explaining how each criterion has been met, while referencing both the page and project numbers as indicated in the resume.⁵⁰

[51] SoftSim did not follow these instructions, but rather populated the evaluation matrix simply by referencing projects and including the bare statement that the experiences of its first and second candidates were to be categorized into subprojects. For example, in the first candidate's evaluation grid, it was stated for the first point-rated criterion (PAR.1) that Project 5 had a duration of 24 months with two subprojects. No further explanation was given as to how or why these subprojects were differentiable from the main project. Accordingly, the evaluators awarded the first candidate points only for the projects that were substantiated.⁵¹

[52] Based on the evaluators' comments, the Tribunal notes that there was uniform agreement that none of the three candidates passed the technical evaluation, not for lack of relevant experience, but because the submissions lacked the detail necessary to evaluate the candidates' experience.⁵² The consensus evaluation document and the evaluators' individual evaluations communicate clearly that they had sought more context and did not consider generic statements pulled from the solicitation documents as sufficient to demonstrate competency.⁵³ The evaluators also pointed to several

⁴⁸ See *Northern Lights Aerobic Team, Inc.* (28 October 2005), PR-2005-004 (CITT) at para. 52; *Excel Human Resources Inc. v. Department of the Environment* (23 March 2012), PR-2011-043 (CITT) at para. 33.

⁴⁹ *Integrated Procurement Technologies, Inc. v. Department of Public Works and Government Services* (30 April 2008), PR-2008-007 (CITT) at para. 13; *Samson* 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-0213-008 (CITT) at para. 37.

⁵⁰ Exhibit PR-2019-053-40, Vol. 1 at 55-60.

⁵¹ Exhibit PR-2019-053-40A (protected), Vol. 2 at 114-116.

⁵² *Ibid.* at 37-45, 55-42, 69-77.

⁵³ *Ibid.* at 114-116.

instances where the submission was non-compliant with the RFP instructions, forcing evaluators to search for the information they were to evaluate.⁵⁴ The candidates' experience in all cases, however, was sufficient to meet the non-rated mandatory experience requirements, which were less detailed than the point-rated requirements.

[53] These comments appear to be similar to previous feedback provided by Elie Touma, the Deputy Director of DFATD's CRM Centre of Excellence. In a series of emails updating SoftSim on the staffing of a candidate under SoftSim's contract under Solicitation No. 19-155898, Mr. Touma explained that SoftSim should provide more concrete details on the projects its contractors completed and how these projects related to the rated criteria. Mr. Touma went on to explain that "the [proposals] that score the highest on the technical evaluation are the proposals that specifically explain in great details the resource's experience and how they meet the evaluation criteria rather than simply listing the work they performed on a project."⁵⁵

[54] With respect to the decision made by DFATD to reject the Microsoft Dynamics certificate of SoftSim's third candidate, the Tribunal finds that this decision was also reasonable. The RFP stipulated that a Microsoft Dynamics CRM certificate was worth five points towards a candidate's score. The evaluation team concluded the candidate's certificate did not meet the requirement as it did not contain the CRM designation.⁵⁶ While SoftSim had argued in its reply to the GIR⁵⁷ that Microsoft Dynamics and Dynamics CRM certificates were equivalent, it did not advance any concrete evidence to this effect. The five points would not have led to SoftSim's third candidate passing on the point-rated criteria in any event.

[55] The Tribunal also finds that DFATD's decision to evaluate SoftSim's first three candidates (of the four it submitted) was reasonable. The RFP required that bidders "submit the current resume of three (3) Programmer Analyst Level 3 resources . . ."⁵⁸ There does not appear to be any evidence that would indicate that DFATD acted inappropriately by selecting SoftSim's first three candidates for the purposes of evaluating its bid (rather than simply finding that SoftSim's bid was inadmissible for containing too many candidates). While the task authorization and tasking assessment procedures contained in the solicitation documents indicate that DFATD would possibly have a need for a fourth or fifth resource over the period of the contract, these procedures are distinct from the bid evaluation procedures.⁵⁹ DFATD was clearly under no obligation to evaluate more than three candidates. Indeed, choosing to select the first three (rather than any other three) was a prudent step, as it guarded against potential complaints from other suppliers that SoftSim had obtained an unfair advantage.

[56] Contrary to SoftSim's assertions that DFATD should have requested clarification concerning which three candidates SoftSim had intended to submit for evaluation, both the Tribunal's jurisprudence and the solicitation documents indicate that requests for clarification are discretionary and that the government department is under no obligation to request clarifications or further information from bidders once they have tendered their bids.⁶⁰

⁵⁴ *Ibid.* at 36, 51, 52, 54, 57, 70.

⁵⁵ Exhibit PR-2019-053-023A, Vol. 1 at 88.

⁵⁶ Exhibit PR-2019-053-40, Vol. 1 at 20 (para. 57); Exhibit PR-2019-053-43 (protected), Vol. 2 at 1.

⁵⁷ Exhibit PR-2019-053-42 (protected), Vol. 2 at 2.

⁵⁸ Exhibit PR-2019-053-40, Vol. 1 at 5151 (s. 4.1).

⁵⁹ See section 7.2 Task Authorization and Appendix 2 and 3 to Annex A, Exhibit PR-2019-053-40, Vol. 1 at 33.

⁶⁰ See *Bell Canada v. Department of Public Works and Government Services* (11 October 2011), PR-2011-031 (CITT) at paras. 38-41; *IBM Canada Ltd., PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University* (29 July 2003), PR-2002-040 CITT) at 15; Exhibit PR-2019-053-40, Vol. 1 at 51.

[57] In furnishing bid evaluations from previous solicitations, SoftSim has provided useful background evidence into DFATD's bid review process and practice. SoftSim alleges in the present case that this evidence highlights systemic problems with DFATD's procurements and that the evaluation of its bid was unreasonable. In the Tribunal's view, it would appear that the opposite is true, as this background evidence has highlighted that DFATD has been remarkably consistent in communicating to SoftSim that its bids required more detail. DFATD has provided SoftSim with timely feedback on its bids,⁶¹ and it appears to have changed some of its point-rated criteria based upon SoftSim's suggestions.⁶²

[58] Based on the above, the Tribunal finds that DFATD's evaluation of SoftSim's bid was reasonable in the circumstances and did not present any issues that would require the intervention of the Tribunal. Therefore, the Tribunal finds that SoftSim's complaint, on this ground, is not valid.

(2) SoftSim's allegations of bias are unsupported

[59] SoftSim alleged that DFATD displayed bias in various ways, including by evaluating SoftSim's bid unfairly, by writing solicitations to benefit a favoured bidder (Coradix), and by putting SoftSim on a "blacklist". For the reasons indicated below, the Tribunal finds that SoftSim's evidence is not of a sufficient weight or reliability to support SoftSim's serious allegations of bias.

Positions of parties

– SoftSim

[60] SoftSim's central allegation is that DFATD has exhibited bias against SoftSim and in favour of the successful bidder, Coradix.⁶³ The Tribunal has summarized SoftSim's specific arguments and evidence as follows.

[61] SoftSim argued that DFATD wrote the solicitation at issue to favour Coradix, based on the following allegations:

- Several potential candidates for the solicitation told SoftSim that they had heard the RFP was written for Coradix;⁶⁴ however, "[none] of them [are] willing to put this in writing because they are afraid to be also black listed by [DFATD]."⁶⁵
- During a telephone conversation with Mr. Dhafir Burhan and another SoftSim employee, a potential candidate for the solicitation stated that he was not going to bid with SoftSim because "... Coradix told him that we have no chance and that these solicitations were written for them."⁶⁶

⁶¹ Exhibit PR-2019-053-01C (protected) at 186-187.

⁶² Exhibit PR-2019-053-041 at 3.

⁶³ Exhibit PR-2019-053-01B, Vol. 1 at 7.

⁶⁴ Exhibit PR-2019-053-01B, Vol. 1 at 10.

⁶⁵ Exhibit PR-2019-053-15, Vol. 1 at 1.

⁶⁶ Exhibit PR-2019-053-23, Vol. 1 at 3.

- Someone associated with Coradix told SoftSim that DFATD was disappointed that Coradix lost Solicitation No. 19-155898 to SoftSim, and that DFATD was trying to “get [Coradix] back”.⁶⁷
- An anonymous source inside DFATD said that Coradix consultants at DFATD had participated in writing the solicitation requirements, that Coradix consultants were informed of Coradix’s success one week before DFATD communicated the results officially, that the DFATD technical authority told Coradix consultants not to bid with any supplier other than Coradix, and that Coradix told one of its consultants that he would be sued by Coradix if he bid with any other supplier.⁶⁸

[62] SoftSim argued that DFATD’s evaluation of the bids received in response to the solicitation at issue favoured Coradix and, as a result, displayed bias. SoftSim’s arguments on this evaluation are summarized above, at paragraphs 31 to 35.

[63] SoftSim also argued that Solicitation No. 20-170714 (i.e. a newer solicitation that is not the subject of the present inquiry) was written to favour Coradix. SoftSim alleged that DFATD added a corporate requirement that is “specific to Coradix”, i.e. that “the company must have provided the service of Solutions Architect and Programmer Analysts for at least one year for Dynamics 2015” and must have “MS Dynamics Silver or Gold partnership with MicroSoft”, which SoftSim argued is “not necessary” but was added only “because Coradix has it”.⁶⁹

[64] SoftSim alleged that DFATD revoked an offer it had made to SoftSim for Solicitation No. 20-156407 (i.e. an older solicitation that is not the subject of the present inquiry). The affidavit signed by SoftSim employees states that Joanne Plummer, who was a contractor with DFATD at the time, informed SoftSim that it had won the mandate, but that DFATD had later revoked the award “due to some internal procurement mistakes at [DFATD]”, namely, that DFATD employees had not monitored the submission inbox properly and had missed evaluating one of the proposals.⁷⁰ Additionally, Joanne Plummer’s affidavit alleged that she was unfairly blamed for this mistake and that DFATD subsequently declined to renew her contract.⁷¹

[65] SoftSim argued that DFATD has put it on a “blacklist” to prevent it from being invited to bid on future contracts.⁷² SoftSim alleged that DFATD invited Coradix and not SoftSim to bid on Solicitation No. 20-172756 (i.e. a newer solicitation that is not the subject of the present inquiry).⁷³ In addition, Joanne Plummer’s affidavit alleged the following: “I had a conversation with [a Director at DFATD] about the complaint Softsim made to [the CITT]. [He] told me that Softsim is known to complain and file with [the CITT]. He told me the way around the complaint is to say in the hearing, he would modify his policy and procedures to satisfy everyone. Then he would put Softsim on a block list [*sic*] not to be invited to bid on [RFPs].”⁷⁴

⁶⁷ Exhibit PR-2019-053-01B, Vol. 1 at 10.

⁶⁸ Exhibit PR-2019-053-035, Vol. 1 at 1.

⁶⁹ Exhibit PR-2019-053-19, Vol. 1 at 1.

⁷⁰ Exhibit PR-2019-053-23, Vol. 1 at 3.

⁷¹ Exhibit PR-2019-053-23B, Vol. 1 at 5, 7.

⁷² Exhibit PR-2019-053-01B, Vol. 1 at 11.

⁷³ Exhibit PR-2019-053-38, Vol. 1 at 1.

⁷⁴ Exhibit PR-2019-053-23, Vol. 1 at 7.

[66] Finally, SoftSim claimed that government officials are getting financial compensation from Coradix. SoftSim alleged that someone within DFATD “is benefiting personally from Coradix (maybe kickbacks or helping a relative or a friend)”⁷⁵ and suggested that Coradix may be “paying money to politicians or a political party”.⁷⁶

– DFATD

[67] DFATD argued that SoftSim has not met the threshold to establish a reasonable apprehension of bias in this case.

[68] DFATD submitted that SoftSim’s evidence should be given no weight because it is comprised of hearsay statements that were improperly submitted to the Tribunal for the truth of their contents. DFATD submitted that there is no means to evaluate the reliability of SoftSim’s statements: for example, even if it was true that the candidate specified or other unnamed individuals made the statements SoftSim has alleged, there is no proof that the statements themselves were accurate.⁷⁷

[69] DFATD denied that the solicitation at issue was “written for” Coradix and that a Director ever stated that SoftSim had been placed on a “blacklist” as alleged by Joanne Plummer.⁷⁸ DFATD also argued that SoftSim’s ongoing participation in DFATD solicitations is proof that it has not been blacklisted. For example, DFATD submitted that SoftSim won the contract for Solicitation No. 19-155898, and was invited to bid on the solicitation at issue and Solicitation No. 20-166051 after having requested an invitation to participate. DFATD also submitted that SoftSim is participating in other ongoing procurement processes, including Solicitations No. 20-172756 and 20-170714.⁷⁹

[70] DFATD did not address the allegation that someone inside DFATD is getting financial “kickbacks” from Coradix, except to the extent that it argued, in general, that SoftSim’s evidence should be given no weight.

Tribunal’s analysis

[71] A duty of fairness and impartiality applies to the federal government’s procurement evaluation process, meaning that evaluators must avoid both actual bias in favour of one bidder, as well as conduct that can give rise to a reasonable apprehension of such bias.⁸⁰ While neither DFATD nor SoftSim makes the distinction, there are separate tests for assessing actual bias and a reasonable apprehension of bias.

[72] Actual bias has been described as “consciously allowing extraneous influences to affect [one’s] mind.”⁸¹ While the test for actual bias varies based on the decision-making context, the

⁷⁵ Exhibit PR-2019-053-19, Vol. 1 at 9.

⁷⁶ *Ibid.* at 1.

⁷⁷ Exhibit PR-2019-053-40A (protected), Vol. 2 at 23.

⁷⁸ *Ibid.* at 24.

⁷⁹ Exhibit PR-2019-053-40, Vol. 1 at 24 (paras. 71-74).

⁸⁰ *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 16572 (FCA) [*Cougar Aviation*] at paras. 21, 23, 35.

⁸¹ *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 64 [*Wewaykum*].

Federal Court of Appeal has indicated that, within the context of Tribunal procurement complaints, the trade agreements set out standards for actual bias.⁸²

[73] According to the Federal Court of Appeal, an allegation of actual bias “cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions It must be supported by material evidence demonstrating conduct that derogates from the standard.”⁸³

[74] More specifically, when alleging that a solicitation was structured to favour a particular bidder, the Tribunal has stated that “a complainant bears the onus to present positive evidence that the government institution structured the terms of the RFP, such as technical requirements or specifications, with the purpose or effect of favouring (or excluding) a particular supplier”⁸⁴ That being said, a government institution may structure an RFP to meet its legitimate operational needs, and “the fact that one bidder is better able than another to meet the specifications of an RFP does not in itself necessarily mean that the requirements of the RFP are biased in favour of that bidder.”⁸⁵

[75] SoftSim’s allegations, if true, would constitute actual bias. Actual bias is more difficult to establish than a reasonable apprehension of bias, as the relative burden of proof is higher.⁸⁶ In the Tribunal’s view, SoftSim’s evidence does not approach the standard needed to establish actual bias, and therefore its allegations are best dealt with under the test for a reasonable apprehension of bias.

[76] The Tribunal applies the following test to determine whether the circumstances of a case give rise to a reasonable apprehension of bias: “What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude? Would [they] think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?”⁸⁷

[77] The Tribunal’s jurisprudence is clear that the complainant bears the burden of supporting its claim. When a complainant alleges even a reasonable apprehension of bias, “it is not sufficient to simply state that there is a belief that there is bias—[the complainant] must offer sufficient evidence in that regard.”⁸⁸ Moreover, the Tribunal generally “presumes the good faith and honesty both of the

⁸² See *Cougar Aviation* at para. 21, in which the Court identified provisions of the *Agreement on Internal Trade* (the predecessor agreement to the *CFTA*) that underlie allegations of actual bias. Similar provisions exist in the *CFTA*, such as Articles 509.4 and 515.1, which provide that the procuring entity must not accept advice from anyone with a commercial interest in the procurement and must treat all tenders under procedures that guarantee fairness and impartiality.

⁸³ *Arthur v. Canada (Attorney General)*, 2001 FCA 223 at para. 8.

⁸⁴ *Horizon Maritime Services Ltd./Heiltsuk Horizon Maritime Services Ltd. v. Department of Public Works and Government Services* (2 January 2019), PR-2018-023 (CITT) at para. 77 [*Horizon*]. See also: *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT) at para. 30 [*R.P.M.*].

⁸⁵ *Almon Equipment Limited v. Canada (Attorney General)*, 2012 FCA 318.

⁸⁶ *Wewaykum* at para. 64.

⁸⁷ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21, citing *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at 394, per de Grandpré J. (dissenting). See also *Horizon* at para. 73.

⁸⁸ *Sunny Jaura d.b.a. Jaura Enterprises v. Department of Foreign Affairs, Trade and Development* (30 January 2019), PR-2018-058 (CITT) at paras. 13, 15 [*Sunny Jaura*]. See also *Renaissance Aeronautics Associates Inc. (D.B.A. Advanced Composites Training) v. Department of Public Works and Government Services* (28 May 2017), PR-2017-063 (CITT) at para. 38; *Tyr Tactical Canada, ULC v. Royal Canadian Mounted Police* (16 May 2016), PR-2016-006 (CITT) at para. 26.

bidders and of the public servants mandated to evaluate their bid”⁸⁹, meaning that the complainant must provide sufficient evidence to overcome this presumption.

[78] DFATD does not appear to dispute that SoftSim’s allegations, if true, would give rise to a reasonable apprehension of bias. The central issue is therefore the Tribunal’s appreciation of SoftSim’s evidence.

[79] When it comes to the rules of evidence, “the Tribunal’s normal practice is to admit evidence liberally, but only to give each item of evidence the weight that it deserves.”⁹⁰ The Tribunal is not strictly bound by the hearsay rule, which usually restricts the admissibility of evidence, rather than the weight it is given. However, the Tribunal has stated that while “the rules of evidence before an administrative tribunal may be relaxed, the Tribunal must still be cautious in relying on what amounts to hearsay evidence.”⁹¹ The Tribunal has previously tested evidence with the common law hearsay rule, which makes an exception for evidence that is both reliable and necessary.⁹²

[80] In the Tribunal’s view, nearly all of SoftSim’s evidence is hearsay, i.e. SoftSim employees affirming that they have been told of DFATD’s alleged bias by potential candidates or anonymous sources inside DFATD. The SoftSim employees who signed its collective affidavit do not have direct knowledge of what they allege are biased statements by DFATD: rather, their purported knowledge comes through second-hand statements. The Tribunal admitted and weighed this evidence, rather than rejecting it categorically as hearsay. However, the Tribunal finds it appropriate to use caution in relying on SoftSim’s second-hand hearsay evidence, particularly insofar as it is used to support serious allegations of bias.

[81] In the Tribunal’s view, SoftSim’s hearsay evidence is imprecise, convoluted, and lacking in specifics. For the most part, the rumours of DFATD’s bias that SoftSim has conveyed are vague and come from anonymous sources.⁹³ SoftSim’s affidavit identifies one source by name; however, it also states that SoftSim has telephone records and social media messages from this source,⁹⁴ which were never provided to the Tribunal. Even if the Tribunal did have the benefit of communications records showing that the source had told SoftSim of DFATD’s bias, this would not show that the source’s statements were true. Without more corroborating evidence, the Tribunal cannot conclude that these rumours of bias are reliable. The Tribunal therefore gives no weight to SoftSim’s hearsay evidence.

[82] That being said, not all of SoftSim’s evidence is hearsay: SoftSim has also provided an affidavit in which Joanne Plummer attests to being told by a director at DFATD that he would put

⁸⁹ *MasterBedroom Inc. v. Department of Public Works and Government Services* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (26 May 2014), PR-2014-012 (CITT) at para. 16.

⁹⁰ *MRP Retail Inc. v. President of the Canada Border Services Agency v. Department of Foreign Affairs, Trade and Development* (27 September 2007), AP-2006-005 (CITT) at para. 51. See also *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (29 December 2017), PR-2015-051 and PR-2015-067 (CITT) at para. 156: “[A]t the Tribunal, whose evidentiary rules are more liberal than the courts’, there is no requirement that an affiant in a compensation determination only testify to their personal knowledge.”

⁹¹ *Hudson’s Bay Company v. President of the Canada Border Services Agency* (21 March 2014), AP-2012-067 (CITT) at para. 43.

⁹² *Danson Décor Inc. v. President of the Canada Border Services Agency* (6 September 2019), AP-2018-043 (CITT) at para. 124 (citing *R. v. Khan*, [1990] 2 SCR 531; *R. v. Smith*, [1992] 2 SCR 915; *R. v. Starr*, [2000] 2 SCR 144).

⁹³ See e.g. Exhibit PR-2019-053-035, Vol. 1 at 1.

⁹⁴ Exhibit PR-2019-23B, Vol. 1 at 3.

SoftSim on a “block list” [*sic*] so that it would not be invited to bid on future RFPs.⁹⁵ In response, DFATD stated that SoftSim has been allowed to participate in the solicitations at issue in this complaint and in File No. PR-2019-057,⁹⁶ as well as Solicitations No. 20-172756 and 20-170714⁹⁷—statements that SoftSim did not refute.

[83] The Tribunal notes that DFATD evaluated SoftSim’s bid for the solicitation at issue in SoftSim’s related complaint, File No. PR-2019-057, as recently as December 2019.⁹⁸ SoftSim has also submitted emails showing that it has received updates from DFATD on Solicitation No. 20-170714, as recently as March 6, 2020.⁹⁹

[84] Therefore, the Tribunal finds that Joanne Plummer’s statements are uncorroborated and, in the circumstances, gives them little weight. Recalling the burden that is on SoftSim to provide sufficient evidence grounding its allegations of bias,¹⁰⁰ the Tribunal finds that Joanne Plummer’s affidavit does not sufficiently substantiate the serious allegations made, and therefore does not give rise to a reasonable apprehension of bias.

[85] Finally, SoftSim’s claim that Solicitation No. 20-170714 was written to favour Coradix is unsubstantiated. Again, it is SoftSim who “bears the onus to present positive evidence that the government institution structured the terms of the RFP . . . with the purpose or effect of favouring (or excluding) a particular supplier”¹⁰¹ It is not sufficient to merely state that certain requirements were added to a solicitation to favour Coradix,¹⁰² without explaining why these requirements are not legitimate operational requirements or showing that only Coradix fulfills these requirements. In any case, Solicitation No. 20-170714 is not the subject of the Tribunal’s inquiry, and as such could only be relevant to the extent that it supports SoftSim’s allegations pertaining to the solicitation at issue, which it does not. The same is true of SoftSim’s arguments pertaining to Solicitation No. 20-156407, which is not the subject of any inquiry by the Tribunal: these arguments do not give rise to a reasonable apprehension of bias in the present inquiry.

[86] In conclusion, the Tribunal finds that SoftSim has not provided sufficient evidence to support a finding of bias or the reasonable apprehension thereof. None of SoftSim’s evidence has convinced the Tribunal that “an informed person, viewing the matter realistically and practically—and having thought the matter through” would conclude that DFATD had failed to treat SoftSim fairly. As such, the Tribunal finds that SoftSim’s complaint, on this ground, is also not valid.

⁹⁵ Exhibit PR-2019-053-23, Vol. 1 at 7. While the fact that SoftSim is actually on a “block list” would still be hearsay, strictly speaking, the fact that the director made the statement would be within Joanne Plummer’s direct knowledge.

⁹⁶ I.e. Solicitations No. 20-166067 and 20-166051.

⁹⁷ Exhibit PR-2019-053-40, Vol. 1 at 24 (paras. 71-74).

⁹⁸ *SoftSim Technologies Inc. v. Department of Foreign Affairs, Trade and Development* (26 March 2020), PR-2019-057 (CITT).

⁹⁹ Exhibit PR-2019-053: Related Correspondence between the Tribunal and SoftSim dated March 13, 2020.

¹⁰⁰ *Sunny Jaura* at paras. 13, 15.

¹⁰¹ *Horizon* at para. 77. See also *R.P.M.* at para. 30; *Almon Equipment Limited v. Department of Public Works and Government Services* (3 January 2012), PR-2011-022 (CITT) at para. 54.

¹⁰² Exhibit PR-2019-053-19, Vol. 1 at 1.

(3) The Tribunal has chosen to not exercise its discretion to cease the inquiry due to vexatious conduct

[87] DFATD has requested that the Tribunal cease its inquiry pursuant to subsection 30.13(5) of the *CITT Act* on the grounds that SoftSim’s complaint is vexatious and an abuse of process. For the reasons that follow, the Tribunal has chosen to not exercise its discretion to cease the inquiry due to SoftSim’s conduct.

Positions of parties

– DFATD

[88] DFATD argued that both SoftSim’s complaint and its actions pursuing the complaint are vexatious, on the grounds that SoftSim has caused needless expenditure of the Tribunal’s resources in managing the complaint and of DFATD’s resources in defending against it. It alleged that SoftSim has used the complaint, as well as its complaint in File No. PR-2019-057, to make “sweeping allegations of corruption and misfeasance”, as well as raising “irrelevant accusations regarding issues outside the Tribunal’s jurisdiction”.¹⁰³

[89] DFATD focused its submissions on jurisprudence concerning subsection 40(1) of the *Federal Courts Act*,¹⁰⁴ which allows the court to impose leave requirements on vexatious litigants.¹⁰⁵ It relied on *Canada v. Olumide*,¹⁰⁶ in which the Federal Court of Appeal found that vexatiousness “comes in all shapes and sizes” and can include “multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, and the harassment or victimization of opposing parties.”¹⁰⁷

[90] DFATD stated that, during these proceedings, SoftSim:

- willfully ignored the Tribunal’s procedural orders;
- copied non-parties and irrelevant personnel on correspondence, including the Prime Minister and other cabinet ministers;
- made irrelevant and unsubstantiated allegations against public servants;
- filed an excessive quantity of materials before the Tribunal, outside of the normal complaints process, with little to no guidance on how these materials were relevant to the inquiry;

¹⁰³ Exhibit PR-2019-053-40, Vol. 1 at 28 (para. 85(e)).

¹⁰⁴ *Federal Courts Act*, RSC 1985, c. F-7.

¹⁰⁵ The provision reads as follows: “If the Federal Court of Appeal or the Federal Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in that court or that a proceeding previously instituted by the person in that court not be continued, except by leave of that court.”

¹⁰⁶ *Canada v. Olumide*, 2017 FCA 42 (CanLII), [2018] 2 FCR 328 [*Olumide*].

¹⁰⁷ *Olumide* at para. 32.

- used inflammatory language against individual public servants and made sweeping allegations of corruption and malfeasance supported only by unsubstantiated hearsay, which lacked specifics and credibility;
 - included the Tribunal in its correspondence with contracting authorities regarding procurements that are not related to the complaint;
 - implied that evaluations will only be fair if contracts are awarded to SoftSim.¹⁰⁸
- SoftSim

[91] According to SoftSim, it has never abused the Tribunal’s process, its complaint is not vexatious, and it has presented its evidence in good faith.¹⁰⁹

Tribunal’s analysis

[92] Subsection 30.13(5) of the *CITT Act* provides that the Tribunal “may decide not to conduct an inquiry into a complaint or decide to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith”

[93] *Black’s Law Dictionary* defines a “vexatious suit” as “[a] lawsuit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued”, and defines “vexatious” as “(. . . conduct) without reasonable or probable cause or excuse; harassing; annoying.”¹¹⁰

[94] In *Acklands-Grainger*,¹¹¹ the Tribunal relied upon the *Canadian Oxford Dictionary* definition of “vexatious” as “not having sufficient grounds for action and seeking only to annoy the defendant.”¹¹² The Tribunal also stated in *Enterasys Networks of Canada Ltd.* that “in order to be vexatious, a proceeding must be obviously devoid of merits, or instituted maliciously or with the intention to harass or annoy the other party.”¹¹³

[95] In *Olumide*, Justice Stratas, for the Federal Court of Appeal, made the following remarks:

In defining “vexatious,” it is best not to be precise. Vexatiousness comes in all shapes and sizes. Sometimes it is the number of meritless proceedings and motions or the reassertion of proceedings and motions that have already been determined. Sometimes it is the litigant’s purpose, often revealed by the parties sued, the nature of the allegations against them and the language used. Sometimes it is the manner in which proceedings and motions are prosecuted,

¹⁰⁸ See Exhibit PR-2019-053-40, Vol. 1.

¹⁰⁹ Exhibit PR-2019-053-42 (protected), Vol. 2 at 7.

¹¹⁰ *Black’s Law Dictionary*, 9th ed. (St Paul, MN:Thomson Reuters, 2009, cited in *Carroll v. Canada (Attorney General)*, 2015 FC 287 at paras. 105-106.

¹¹¹ *Acklands-Grainger Inc. v. Department of Public Works and Government Services* (19 September 2011), PR-2011-007 (CITT) [*Acklands-Grainger*] at para. 51.

¹¹² *Canadian Oxford Dictionary*, 2nd ed., s.v. “vexatious”; *Acklands-Grainger* at para. 51.

¹¹³ *Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at para. 71.

such as multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, and the harassment or victimization of opposing parties.¹¹⁴

[96] In addition, the Ontario Court of Appeal's decision in *Foy v. Foy*¹¹⁵ is widely applied by courts and tribunals, and includes the following principles to recognize vexatious litigant proceedings: actions that were brought to determine issues that have already been determined; actions from which no reasonable person could reasonably expect to obtain relief; and actions that were brought for purposes other than the assertion of legitimate rights.¹¹⁶

[97] The Tribunal notes that *Olumide* and *Foy* focus on designating a *litigant* as vexatious, whereas subsection 30.13(5) of the *CITT Act* focuses on the characterization of a particular *complaint*. This distinction is important because courts do not have a mechanism which allows them to reject an action, appeal or application for judicial review immediately upon receipt (i.e. at the filing stage) like the Tribunal does for procurement complaints. Thus, the vexatious litigant label allows courts to maintain a tighter control on their process and the filing of future matters. In contrast, the *CITT Act* and the *Regulations* set out a process that allows the Tribunal to carry out a "gate-keeper" role.¹¹⁷ In discharging that role, the Tribunal can reject complaints which do not meet the requirements set out in the *Regulations*, including those complaints that do not disclose a reasonable indication that the procurement has not been conducted in accordance with the provisions of the relevant trade agreements. This, in turn, greatly reduces the likelihood of a complaint being considered vexatious.

[98] Therefore, in the Tribunal's view, subsection 30.13(5) of the *CITT Act* allows it to weed out cases that—although may meet all of the requirements set out in the *Regulations*—are used to strategically inconvenience or annoy the relevant government institution or the successful supplier. The vexatious nature of a complaint can be apparent either at the time of filing or later once the inquiry is underway, which is why subsection 30.13(5) can be used to reject a complaint at the initial acceptance stage or to cease conducting an inquiry. The burden to demonstrate that a complaint is vexatious is fairly high. Indeed, the Tribunal has never rejected a complaint or ceased an inquiry on the grounds that the complaint was vexatious.¹¹⁸

[99] SoftSim's complaint was accepted for inquiry as the Tribunal determined that it met the requirements set out in the *Regulations*. There was no indication that the complaint was vexatious at that time, as the Tribunal would otherwise have decided not to conduct an inquiry.

[100] Therefore, at this point in the complaint process, the question is whether SoftSim's conduct *during* the inquiry indicates that the complaint is vexatious or, in other words, that the complaint was only filed to inconvenience or annoy DFATD or Coradix.

¹¹⁴ *Olumide* at para. 32.

¹¹⁵ *Foy v. Foy* (No. 2) (1979), 1979 CanLII 1631 (ON CA) [*Foy*].

¹¹⁶ These principles were summarized, among other principles, in *Re Lang Michener and Fabian*, 1987 CanLII 172 (ON SC).

¹¹⁷ In accordance with subsection 30.13(1) of the *CITT Act*, the Tribunal must *decide* whether to conduct an inquiry into a complaint. Subsection 7(1) of the *Regulations* sets out the conditions that must be satisfied in order for the Tribunal to accept a complaint for inquiry.

¹¹⁸ The Tribunal appears to have come close in *Netgear Inc.*, when it stated that the complainant's repeated assertions of the same grounds bordered "on a vexatious abuse of process". See *Netgear Inc. v. Department of Public Works and Government Services* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 9.

[101] SoftSim's conduct during the inquiry was unprecedented in the Tribunal's history, and caused both expense and inconvenience, if perhaps more for the Tribunal than DFATD. However, the Tribunal did not believe that it was in the interest of the procurement review mechanism that it cease its inquiry. Additionally, the GIR and comments on the GIR had already been filed. Finally, the Tribunal considered that it was beneficial to address SoftSim's allegations on their merits.

[102] Nonetheless, the Tribunal wishes to emphatically underscore the fact that SoftSim's conduct, both in the current inquiry and in other proceedings before the Tribunal cannot be tolerated as a matter of course. SoftSim made numerous, disorderly and untimely filings, thus making it extremely difficult for DFATD to know the case it had to meet. SoftSim's conduct also posed operational difficulties for the Tribunal, and its disorderly, frequent, and voluminous communications with the Tribunal were an inefficient use of the Tribunal's limited resources.

[103] The Tribunal's record for this complaint contains more than three hundred documents and emails, most of which were submitted by SoftSim. These documents included a large number of emails that, at best, were only loosely related to the complaint, multiple copies of the same pleadings sent on separate occasions and many instances where pleadings were sent in large batches, uncollated, and without explanation as to their significance. SoftSim's filings were also sent out of sequence and without respecting the Tribunal's inquiry schedule, meaning that SoftSim was continuously supplementing its complaint throughout the inquiry. SoftSim was also not consistent in ensuring that DFATD was copied on all correspondence.

[104] In the present matter and, without exception in SoftSim's other complaints, the Tribunal's Registry has repeatedly had to remind SoftSim that correspondence with the Registry must relate directly to an active file or must concern the filing of a new complaint. The Tribunal has also sent several procedural directions to SoftSim during the present inquiry, including the following:

- A letter dated February 27, 2020, requesting that, if SoftSim intended to file documents, that they be filed subject to the timeline or that it request an extension.
- A letter dated March 10, 2020, advising SoftSim that, if it wanted to challenge the results of a solicitation that was not the subject of the complaint, it would need to file a new complaint;
- A letter dated March 13, 2020, advising SoftSim that it could not withdraw a solicitation from its complaint when that solicitation was not the subject of an inquiry. The Tribunal reiterated that SoftSim must file a new and separate complaint for each solicitation to which it objects.
- A letter dated March 13, 2020, explaining the prerogative of government departments to be represented by counsel before the Tribunal and the available option for complainants to be represented by counsel at their own expense.
- A letter dated March 17, 2020, reminding SoftSim that the Tribunal's present inquiry, as well as its inquiry in File No. PR-2019-057, pertained solely to the issues raised in SoftSim's complaints. The third paragraph of this letter advised SoftSim that any future correspondence that did not specifically relate to the solicitations covered by the inquiries would not be acknowledged and would be given no further consideration.

- A letter dated March 19, 2020, notifying SoftSim that it would need to obtain permission from the Tribunal prior to filing additional materials in the present inquiry and in the inquiry in File No. PR-2019-057, which was subsequently discontinued.
- Numerous emails requesting that SoftSim specify to which files its communications related (see, for example, emails sent February 7, 20, and 21, 2020, and March 13, 2020.)

[105] SoftSim also made direct accusations toward the Tribunal and questioned its independence. For example, in an email to the Tribunal, the Prime Minister, and the Minister of Foreign Affairs, SoftSim called the Tribunal a “useless department that is slave to the government”, and suggested that the Prime Minister “should cancel your organization entirely and use the money to assist the poor Canadians suffering from COVID-19.”¹¹⁹

[106] Similar conduct has also extended to SoftSim’s other procurement complaints. In File No. PR-2019-068, SoftSim alleged that the incumbent supplier did not have the required experience. The Tribunal found that this allegation was unsubstantiated and, in its reasons for deciding not to conduct an inquiry, it cautioned that “complainants ought not make bald unsubstantiated allegations that are geared at casting aspersions on the integrity of procuring entities, or individual public servants.”¹²⁰

[107] Additionally, after the Tribunal decided not to conduct an inquiry into File No. PR-2019-064, SoftSim again called the Tribunal biased and requested that the Prime Minister defund it.¹²¹

[108] The above comments must be contrasted with laudatory comments that SoftSim had previously made to the Tribunal when the present complaint was accepted for inquiry: “You guys are doing [a] great job to ensure fair and transparent trade with the government. As a tax [payer], I am very proud of you and the work you are doing. Thank you very much. . . . This order to [postpone] the award of the contract is a perfect proof that you are determined to ensure fair trade.”¹²²

[109] As indicated above, the Tribunal did not believe it appropriate to cease the inquiry as requested by DFATD. Nonetheless, the Tribunal must underscore that SoftSim’s conduct throughout these proceedings was wholly inappropriate. The Tribunal notes that subsection 17(2) of the *CITT Act* provides it with broad powers to control its proceedings. These include the power to impose strict compliance with its rules or to institute special rules with respect to the filing of documents. The Tribunal also has the power to hold a party in contempt, if a party’s behaviour rises to that level. SoftSim’s behaviour in these proceedings fell just short of that level.

[110] The Tribunal also notes that it has the discretion to vary its cost awards in light of parties’ actions or conduct during the complaint proceedings. As will be addressed below, SoftSim’s conduct in the present matter did have an impact on the quantum of the Tribunal’s cost award.

¹¹⁹ Exhibit PR-2019-053-40, Vol. 1 at 153.

¹²⁰ *eVision Inc., SoftSim Technologies Inc., in Joint Venture v. Department of National Defence* (25 March 2020), PR-2019-068 (CITT) at para. 39.

¹²¹ Exhibit PR-2019-064-06.04, Vol. 3 at 2.

¹²² Exhibit PR-2019-053: Related Correspondence between the Tribunal and SoftSim dated February 5, 2020.

COSTS

[111] Both parties have requested their costs, but neither has made submissions on the amount.

[112] The Tribunal has broad discretion to award costs under section 30.16 of the *CITT Act*. The Tribunal follows the “judicial model” under which, generally, the winning party is entitled to its costs.¹²³ As such, the Tribunal will award costs to DFATD.

[113] An award of costs is not intended to be a source of profit for the successful party, nor is it imposed as punishment on the party who pays it.¹²⁴ Costs are generally determined in accordance with the Tribunal’s *Procurement Costs Guideline* (the *Guideline*), which sets out a flat-rate system based on the level of complexity of the procurement, the complaint, and the complaint proceedings.

[114] Based on the factors listed in the *Guideline*, the Tribunal’s assessment is that the level of complexity in this case amounts to Level 2, which has an associated all-inclusive flat rate of \$2,750. The complexity of the procurement was at a medium level, as the services required were specialized, relatively undefined and were to be provided on a project-level basis, rather than during a predefined period. The complaint was also of medium complexity, as it involved an analysis of point-rated criteria and allegations of bias. The proceedings were of high complexity, owing to the high volume of irregular pleadings and materials submitted, the use of affidavit evidence, and the 135-day timeline.

[115] However, the *Guideline* was not intended to address situations similar to that which unfolded in the present proceeding. As discussed above, while SoftSim’s conduct in this proceeding did not rise to the level of being vexatious, it was nonetheless objectionable and had the effect of unnecessarily complicating the proceeding. SoftSim made lengthy, disordered and untimely filings, many of which lacked relevance. SoftSim’s conduct had a material impact on the Tribunal and its limited resources, but more importantly for the purposes of determining a cost award, this conduct prevented DFATD from knowing the case it had to meet, as SoftSim’s allegations created a constantly moving target.

[116] Given the additional difficulties that SoftSim’s conduct created for DFATD in preparing its response to the complaint, the Tribunal will exercise its discretion to depart from the *Guideline*. Therefore, although the *Guideline* indicates that a level of complexity amounting to Level 2 has an associated flat rate of \$2,750, the Tribunal will increase that amount by \$750 and thus award DFATD its costs in the amount of \$3,500. All things considered, the Tribunal considers this amount to be reasonable. The Tribunal will not hesitate to award actual costs in future complaint proceedings should SoftSim conduct itself in a similar manner, unabated.

[117] The Tribunal will not seek comments on this cost award as is provided for in the *Guideline*. This departure from usual practice is warranted under the circumstances precisely because of SoftSim’s behaviour in these proceedings. As such, the Tribunal’s cost award is final.

¹²³ See *Canadian North v. Department of Indian Affairs and Northern Development* (15 May 2007), PR-2006-026R (CIIT) at para. 7 and the Tribunal’s *Procurement Costs Guideline* at section 2.1.

¹²⁴ See *SoftSim Technologies Inc. v. National Research Council of Canada* (5 November 2018), PR-2018-015 (CIIT) at para. 6.

DETERMINATION OF THE TRIBUNAL

[118] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

[119] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards DFATD its costs in the amount of \$3,500 for responding to the complaint, which costs are to be paid by SoftSim. The Tribunal directs SoftSim to take appropriate action to ensure prompt payment.

Peter Burn

Peter Burn

Presiding Member

ANNEX 1: Solicitation No. 20-166067:**MANDATORY AND POINT RATED CRITERIA**

| A.7 PROGRAMMER ANALYST LEVEL 3 RESOURCE NAME | | | | |
|---|--|-------------------------|---|--|
| MANDATORY CRITERIA | | MET/ NOT MET | SUBSTANTIATION/ CROSS-REFERENCE TO PROPOSAL (SUPPLIER TO INSERT) | |
| PAM.1 | <p>The bidder must submit the current resume of three (3) Programmer Analyst Level 3 resources each with a valid Government of Canada *Secret or higher security clearance and must demonstrate using project descriptions that each proposed resource has a minimum ten (10) years of experience as a Programmer Analyst in accordance with the TBIPS Supply Arrangement EN578-170432.</p> <p>* The Secret clearance must be valid at the date and time of the RFP bid closing. Bidders should provide the proposed resource's full legal name, date of birth and security file number.</p> | | | |
| PAM.2 | The bidder must demonstrate, using detailed project descriptions, that each proposed resource has a minimum of three (3) years' experience configuring Microsoft Dynamics CRM 2015 or greater implementations. | | | |
| PAM.3 | The bidder must demonstrate, using detailed project descriptions, that each proposed resource has a minimum five (5) years' experience developing applications using Microsoft .NET technologies. | | | |
| POINT RATED CRITERIA | | POINTS | POINT SCALE | SUBSTANTIATION/ CROSS REFERENCE OF PROPOSAL |
| PAR.1 | <p>The bidder should demonstrate, using detailed project descriptions, that each proposed resource has experience working as a Programmer Analyst on complex* and integrated** MS Dynamics CRM 2015 or greater project***.</p> <p>a. analyzing business requirements</p> | /30 | <p>1 to 2 projects = 10 points 3 to 4 projects = 20 points 5 or more projects = 30 points</p> | |

| | | | | |
|---------------------|--|------------|---|--|
| | <p>and converting them into functional requirements; b. implementing functional requirements and system specifications; c. providing advice and coaching on the implementation of systems and solutions; d. developing technical specification documents (such as system blueprints, design documents); e. analysing and making changes to systems and limiting impact on user base.</p> <p>* Complex is defined as a multi-team, multi-stakeholder, multi-process environment leveraging MS Dynamics CRM for its day-to-day activities. ** Integrated is defined as a Microsoft Dynamics CRM instance that connects to other enterprise systems or applications.</p> | | | |
| <p>PAR.2</p> | <p>The bidder should demonstrate, using detailed project descriptions that each proposed resource has experience programming business processes for a MS Dynamics CRM 2015 or greater solutions.</p> | <p>/25</p> | <p>1 project = 5 points 2 projects = 10 points 3 projects = 15 points 4 or more projects = 20 points 5 or more projects = 25 points</p> | |
| <p>PAR.3</p> | <p>The bidder should demonstrate, using detailed project descriptions, that each proposed resource has experience customizing* Microsoft Dynamics CRM 2015 or greater solutions. * Customizing is defined as writing code to modify the look and feel, implement complex business rules or to enhance usability leveraging programming languages such as .NET or JavaScript</p> | <p>/20</p> | <p>1 project = 5 points 2 projects = 10 points 3 projects = 15 points 4 or more projects = 20 points</p> | |

| | | | | |
|---------------------------------------|---|-----|--|--|
| PAR.5 | The bidder should demonstrate, using detailed project descriptions, that each proposed resource has experience: a. Developing plugins for Microsoft Dynamics CRM 2015 or greater and b. Developing using SDK (Software Development Kit) for Dynamics CRM 2015 or greater. | /20 | 1 project = 5 points 2 projects = 10 points 3 projects = 15 points 4 or more projects = 20 points | |
| PAR.6 | The bidder should demonstrate, that each proposed resource holds a valid Microsoft Dynamics CRM certification. Copy of certification to be provided with the bid. | /5 | 5 points | |
| Minimum Pass Mark:= 70% 70/100 | | | /100 pts | |

Source: Solicitation No. 20-166067, Exhibit No. PR-2019-053-40, Vol. 1, Exhibit 1 at 56-60.