Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2020-031

SoftSim Technologies Inc.

v.

Department of Foreign Affairs, Trade and Development

Determination issued
Wednesday, November 25, 2020

Reasons issued
Thursday, December 10, 2020

Canada

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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 valid, in part. As the designated contract has been cancelled, the complainant has already been granted a remedy, as sought in its complaint as filed. In view of this, the remaining grounds of the complaint are now moot and the Tribunal declines to grant any further remedy.

The parties shall bear their own costs.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member

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

Tribunal Panel:	Susan D. Beaubien, Presiding Member
Support Staff:	Jessye Kilburn, Counsel
Complainant:	SoftSim Technologies Inc.
Government Institution:	Department of Foreign Affairs, Trade and Development
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STATEMENT OF REASONS

BACKGROUND

[1] SoftSim Technologies Inc. (SoftSim) has filed a complaint[1] with the Canadian International Trade Tribunal concerning a tender issued by the Department of Foreign Affairs, Trade and Development (DFATD) (Solicitation No. 20-174589) for professional services of multiple resource categories and levels available through the Task-Based Informatics Professional Services Supply Arrangement. The Request for Proposal (RFP) was issued on May 5, 2020, with an initial closing date of May 22, 2020.

[2] The RFP included a Statement of Work describing the tender's objective as the procurement of a team of resources to assist with implementation of Digital Learning Strategy priorities.[2]

[3] Bids were to be assessed based on both technical merit and price. The winning bid was to be selected using a combined rating of technical merit and price.[3]

[4] The RFP prescribed certain mandatory technical requirements.[4] A bid that did not comply with each and every mandatory requirement would be deemed non-responsive and disqualified. Bids meeting mandatory requirements would be rated and assigned a technical score, having regard to point-rated technical criteria.[5]

[5] Only responsive bids would proceed to a financial evaluation of the pricing aspects of the bid content. In order to be responsive, a bid had to comply with all the bid requirements, meet all the mandatory technical evaluation criteria and obtain at least a prescribed minimum point score for technical evaluation. The RFP made it clear that these conditions were cumulative, i.e. each condition had to be met for the bid to be considered as responsive.[6]

[6] Fourteen companies submitted bids, including SoftSim.[7]

[7] SoftSim was informed that its bid had been deemed non-compliant with one of the mandatory technical requirements. As such, SoftSim's bid was disqualified and received no further consideration.[8] The contract was awarded to another bidder, Cofomo Ottawa, on August 19, 2020.[9]

[8] DFATD found that SoftSim's bid was non-compliant with mandatory requirement M2 − Corporate Capacity (M2) which provides as follows:

> The bidder **MUST** have a minimum of three (3) Business Consulting and/or Project Management Support services contracts with a Crown corporation, department, or agency of the Government of Canada.

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1 Exhibit PR-2020-031-01A.
2 Exhibit PR-2020-031-07 at 53.
3 *Ibid.* at 20-21.
4 *Ibid.* at 23-28.
5 *Ibid.* at 18-19.
6 *Ibid.* at 20-21.
7 Exhibit PR-2020-031-20A at 5.
8 *Ibid.* at 6-7.
9 Exhibit PR-2020-031-07 at 1.

A) Each contract referenced should meet the following criteria:

- Contract with a single client
- A minimum total contract value of $1,000,000.00 (CDN)
- A minimum contract period of one year:
- Completed in the last five years, as of bid closing date, or has been ongoing for a minimum of six months, as of bid closing date; and
- Have a minimum of 70 days billed for two of the three same categories referenced in M1

B) For the proposed resource, the bidder should provide the following information for each project completed:

- Name of the organization
- Name of project
- Brief description of the project
- Period of project - Starting date and end/date (Year/month)
- Name of contact, phone number and e-mail address.[10]

[9] In purported compliance with M2, SoftSim submitted representative examples of previous experience with four of its clients. These included the Fonds de recherche du Québec - Santé (FRQS) and the Canada Foundation for Innovation (CFI).[11]

[10] DFATD concluded that SoftSim's bid failed to fulfill M2 because neither the FRQS nor the CFI was "a Crown corporation, department, or agency of the Government of Canada." DFATD took the position that "Government of Canada" should be interpreted to mean the *federal* government of Canada.[12]

[11] Based on this interpretation, SoftSim could not rely upon its prior work experience with FRQS, as this entity forms part of a provincial government.

[12] With two of its four prior reference projects having been disqualified, SoftSim's bid was consequently one reference project short of the three projects prescribed by M2. Accordingly, SoftSim's bid stood disqualified and was not evaluated for either technical or financial content.

[13] SoftSim asked DFATD to reconsider[13] its interpretation of M2 but PWGSC declined to do so, stating that neither the FRQS nor the CFI formed part of the Core Public Administration of Canada, as set under the *Financial Administration Act*.[14] SoftSim brought its complaint to the Tribunal on August 19, 2020,[15] and submitted additional material on August 20, and 27, 2020.[16]

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10 Exhibit PR-2020-031-20A at 6.
11 *Ibid.* at 6-7; Exhibit PR-2020-031-01B (protected) at 21-28.
12 Exhibit PR-2020-031-01C; Exhibit PR-2020-031-01D at 8-9.
13 Exhibit PR-2020-031-01; Exhibit PR-2020-031-01D.
14 Exhibit PR-2020-031-01F at 1-2.
15 Exhibit PR-2020-031-01A.
16 Exhibit PR-2020-031-01C; Exhibit PR-2020-031-01D; Exhibit PR-2020-031-01F; Exhibit PR-2020-031-01G.

[14] In its complaint, SoftSim alleges that DFATD wrongly interpreted the term "Government of Canada" in M2 as being limited to the federal government of Canada. SoftSim submits that the term "Government of Canada" should be broadly construed because the Government of Canada comprises three levels – federal, provincial/territorial and municipal.[17] To support this argument, SoftSim filed printouts from several government Web sites.[18]

[15] SoftSim contends that, since DFATD evaluated bids based on its finding that only federal entities could satisfy M2, DFATD wrongly awarded a contract based on criteria differing from those prescribed by the RFP, contrary to Article XII of the World Trade Organization's Revised Agreement on Government Procurement)[19] and Article 506 of the Agreement on Internal Trade.[20]

[16] SoftSim also filed materials which it says demonstrate that both the FRQS and the CFI form part of the "Government of Canada."[21] More particularly, SoftSim asserts that the CFI falls within the portfolio of the federal Minister of Innovation, Science and Industry.[22]

[17] By way of remedy, SoftSim asks that the bids be re-evaluated and that the designated contract be postponed and/or terminated. SoftSim also seeks compensation by an amount specified by the Tribunal and the reimbursement of its bid preparation costs and complaint costs.[23]

[18] The Tribunal accepted SoftSim's complaint for inquiry on September 3, 2020, and a prescribed notice was published in the *Canada Gazette* dated September 19, 2020.[24]

[19] DFATD filed a Government Institution Report (GIR) on October 16, 2020.[25]

[20] SoftSim filed comments, purportedly in response to the GIR, on October 16, 2020.[26]

[21] Prior to filing the GIR, counsel for DFATD notified SoftSim and the Tribunal that the contract would be cancelled and a new RFP would be issued.[27] The rationale for this step was said to be DFATD's conclusion that the specification for M2 requiring bidders to demonstrate prior project experience with a federal government entity was unduly restrictive and inconsistent with the trade agreements.[28]

[22] Notwithstanding, SoftSim declined to withdraw its complaint. The parties apparently engaged in discussions, initiated by DFATD, to achieve resolution or withdrawal of this complaint

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17 Exhibit PR-2020-031-01A at 10-11.
18 *Ibid.* at 108-165.
19 Online: World Trade Organization <https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm> (entered into force 6 April 2014) [AGP].
20 Agreement on Internal Trade, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat https://www.cfta-alec.ca/wp-content/uploads/2017/06/Consolidated-with-14th-Protocol-final-draft.pdf; Exhibit PR-2020-031-01A at 11.
21 Exhibit PR-2020-031-01A at 108-165.
22 *Ibid.* at 134-138.
23 *Ibid.* at 7-8.
24 Exhibit PR-2020-031-04 at 3.
25 Exhibit PR-2020-031-20A.
26 Exhibit PR-2020-031-21.
27 Exhibit PR-2020-031-12A.
28 Exhibit PR-2020-031-20A at 8-9.

without further adjudication by the Tribunal. SoftSim filed copies of related correspondence with the Tribunal.

[23] It is well established that communications to settle or avoid a contested proceeding are subject to settlement privilege and are not admissible as evidence:

> The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.[29]

[24] Settlement privilege promotes honest and frank discussions between parties, which can facilitate resolution of a dispute. Those discussions can thus proceed without the parties being concerned that information disclosed will later be used against them, if no settlement is reached.[30]

[25] This general principle is subject to narrow exceptions which are inapplicable to this proceeding.[31]

[26] The Tribunal has previously recognized and applied the doctrine of settlement privilege.[32]

[27] Accordingly, the Tribunal has not considered the settlement correspondence[33] between DFATD and SoftSim in reaching its determination.

ANALYSIS

[28] There is no dispute that the RFP pertains to a "designated contract" within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act*.[34]

[29] As DFATD has conceded that the M2 technical criteria were too narrow, the Tribunal finds that SoftSim's complaint is valid in part. DFATD cited trade agreement provisions stipulating that a solicitation cannot limit participation to suppliers who have been previously awarded a contract by a particular procuring entity.[35] Accordingly, M2 was unnecessarily restrictive because it limited participation to bidders with prior experience with the federal government.

[30] The designated contract underpinning SoftSim's complaint has been voluntarily terminated by DFATD. Accordingly, SoftSim has received a remedy that was requested in its complaint.

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29 *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 2.

30 *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at paras. 31-34; *Signature Inns, Inc. v. Carleton Homes Ltd*, (1987), 18 C.P.R. (3d) 124 at 125; *Canadian Media Corp. v. Canada*, (1991), 48 F.T.R. 68 at 71.

31 For example, *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 3; *Bertram v. Canada*, 1995 CanLII 3563 (FCA), [1996] 1 FC 756; *Roberts v Zoomermedia Limited*, 2015 ONSC 1120 at para. 25.

32 *Canadian Tire Corporation, Limited*, 2015 CanLII 153844 (CA CITT).

33 This is considered to include SoftSim's comments in reply to the GIR (Exhibit PR-2020-031-21), which made reference to the content of previous settlement correspondence.

34 R.S.C., 1985, c. 47 (4th Supp.).

35 Article 503(5)(e) of the Canadian Free Trade Agreement states that, unless otherwise specified, procuring entities contravene the agreement by "limiting participation in a procurement only to suppliers that have previously been awarded one or more contracts by a procuring entity". Article VIII(2)(a) of the AGP states the following: "In establishing the conditions for participation, a procuring entity . . . shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by a procuring entity of a given Party."

[31] The GIR included the technical merit scores and bid pricing for the other bidders. It revealed that SoftSim's quoted bid price was higher than those of several other bidders.[36] In view of this, there is no basis for the Tribunal to conclude that SoftSim would have been the successful bidder, had its bid not been disqualified. As such, the Tribunal declines to recommend compensation payable to SoftSim or to make an award of bid costs.

[32] Given the above, the remaining issues of the complaint, namely SoftSim's arguments that DFATD adopted an incorrect and unduly restrictive interpretation of the term "Government of Canada" are now moot, as are SoftSim's arguments that each of the FRQS and the CFI should be found to be "a Crown corporation, department, or agency of the Government of Canada".

[33] An issue or proceeding becomes moot when there is no longer a live controversy between the parties. If the proceeding is moot, the court or tribunal retains a discretion to hear and decide the matter. In exercising that discretion, the following factors should be considered: (1) the existence of an adversarial relationship between the parties; (2) concern for judicial economy; and (3) public interest in having the issue decided.[37]

[34] As the designated contract has been cancelled and the solicitation will be re-tendered, there is no longer a live controversy as between SoftSim and DFATD.[38]

[35] Given that SoftSim's complaint is now moot, the Tribunal must consider whether it should nonetheless exercise its discretion to decide the remaining issues. The exercise of such discretion is not determined mechanistically[39] and is considered to be a departure from the usual practice that moot issues are not decided.[40]

[36] Having considered these factors, the Tribunal declines to exercise its discretion to decide the aspects of SoftSim's complaint which are now moot.

[37] In view of the cancellation of the designated contract, there is no adversarial relationship as between SoftSim and DFATD relevant to the moot issues. The prospect of a future dispute with respect to the re-tendered RFP is speculative. In retendering the procurement, DFATD is free to redefine or reframe the mandatory technical criteria of the new RFP. If the new tender includes an equivalent requirement to M2 which is worded ambiguously, SoftSim (and any other bidder) will have the opportunity to seek clarification or otherwise object at that time.

[38] Moreover, no practical result would be achieved by deciding the moot issues. Even supposing that those issues would be decided in SoftSim's favour, the consequential conclusion would be that SoftSim's bid should have been found responsive to the RFP and evaluated for technical merit, and then on financial merit, assuming that SoftSim's bid would have received at least the requisite minimum technical point score. The Tribunal is not in a position to itself perform, at first instance, a technical assessment of the bids. Nor can it recommend that such an assessment and bid evaluation be carried out by DFATD, as the framework for doing so is no longer present, given the cancellation of the designated contract and DFATD's decision to issue a new RFP.

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36 Exhibit PR-2020-031-20B (protected), Exhibits 2, 3.

37 *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at para. 37 [*Borowski*]; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.

38 *MD Charlton Co. Ltd.*, 2015 CanLII 153744 (CA CITT) at para. 10.

39 *Borowski* at para. 42*; Eli Lilly Canada Inc. v. Novopharm Limited*, 2007 FCA 359 at para. 26.

40 *Borowski* at para. 30; *Engineers Canada v. MMI-IPCO, LLC*, 2015 FC 839 at para. 34.

[39] Finally, there is no compelling public interest in deciding the moot issues. A procuring entity has the discretion, subject to trade agreement obligations, to tailor the tender requirements to its needs. These requirements could include specifying the scope of prior bidder experience with similar work. As this is a factual issue dependent on the particular procurement, there is no overriding principle of law that should be decided.

[40] Accordingly, for the above reasons, the Tribunal finds that SoftSim's complaint is valid, in part. With the cancellation of the designated contract, SoftSim has received a remedy that it sought in its complaint. The remaining grounds of the complaint are moot and the Tribunal declines to exercise its discretion to decide them or to grant any further relief.

[41] In view of these circumstances and outcome, the parties shall bear their own costs.

Susan D. Beaubien

Susan D. Beaubien
Presiding Member