



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2021-084

Eolyss Solutions Inc.

*Decision made  
Thursday, March 24, 2022*

*Decision and reasons issued  
Monday, April 4, 2022*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

**BY**

**EOLYSS SOLUTIONS INC.**

**AGAINST**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**DECISION**

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

Frédéric Seppey  
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Frédéric Seppey  
Presiding Member

## STATEMENT OF REASONS

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

### SUMMARY OF THE COMPLAINT

[2] This complaint concerns a Call for Proposals (CFP) (Solicitation W7714-227982) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) as part of the Innovation for Defence Excellence and Security (IDEaS) program, seeking innovative solutions to defence and security challenges.

[3] The complainant, Eolyss Solutions Inc. (Eolyss), submitted a bid in response to a challenge under the IDEaS program entitled “Less GHGs on the Seas: Practical Solutions to Measure and Record Energy Consumption” (Challenge).

[4] In its complaint, Eolyss essentially challenges the evaluation of its bid and the overall score it obtained. The grounds of the complaint are as follows:

- (1) As a first ground of complaint, Eolyss argues that the evaluators failed to take the entire proposal into consideration in their evaluation of each criterion, contrary to section 4.1.6 of the CFP.<sup>3</sup>
- (2) As a second ground of complaint, Eolyss condemns the scoring system established in the evaluation grid (allowing only three or four possible ratings for each criterion),<sup>4</sup> which, according to Eolyss, did not allow evaluators to fully translate their comments into numerical scores. Eolyss argues that such a scoring system may be “biased” and subjective, and therefore suggests that it would be reasonable and necessary to allow intermediate scores.<sup>5</sup>

[5] As a remedy, Eolyss requests that its bid be re-evaluated. Eolyss is also requesting the Tribunal to restore its right to have its bid considered with regard to the Challenge. If this is not possible, Eolyss is requesting compensation for its bid preparation costs.<sup>6</sup>

[6] For the following reasons, the Tribunal has decided not to inquire into the complaint.

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>2</sup> SOR/93-602.

<sup>3</sup> Exhibit PR-2021-084-01.A at 5.

<sup>4</sup> Exhibit PR-2021-084-01 at 40–46.

<sup>5</sup> Exhibit PR-2021-084-01.A at 16.

<sup>6</sup> Exhibit PR-2021-084-01 at 8; Exhibit PR-2021-084-01.A at 16–17.

## BACKGROUND

[7] On August 4, 2021, PWGSC issued the CFP as part of the IDEaS program,<sup>7</sup> which was accessible through the SAP Ariba platform.<sup>8</sup>

[8] On August 12, 2021, Eolyss became aware of the Challenge<sup>9</sup>, as well as of PWGSC's evaluation grid.<sup>10</sup>

[9] The purpose of the Challenge was to find innovative solutions—i.e. new systems and technologies—to accurately measure fuel and load energy consumption and greenhouse gas (GHG) emissions data.<sup>11</sup>

[10] The tender notice for the Challenge was amended three times, and the closing date was extended to October 5, 2021, at 14:00 Eastern Daylight Time.<sup>12</sup>

[11] On October 5, 2021, Eolyss submitted a final version of its proposal in response to the Challenge.<sup>13</sup> Eolyss's proposed solution was to adapt a platform for GHG emissions and avoidance calculations that it is developing for the merchant navy and to promptly put it to use within the Royal Canadian Navy (RCN).<sup>14</sup>

[12] On or around February 10, 2022, PWGSC would have informed Eolyss that it had rejected its bid, without further details.<sup>15</sup>

[13] On February 15, 2022, PWGSC sent Eolyss a regret letter by email stating that the submitted proposal had been found to be non-responsive because it had not achieved the minimum passing score of 70 points for the point-rated criteria.<sup>16</sup>

[14] On February 22, 2022, Eolyss emailed<sup>17</sup> an objection with a detailed argument<sup>18</sup> to PWGSC to challenge the evaluation of its bid.

[15] On February 25, 2022, having received no response, Eolyss contacted PWGSC again.<sup>19</sup>

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<sup>7</sup> Exhibit PR-2021-084-01.A at 2.

<sup>8</sup> See the CFP description on Buyandsell.gc.ca, online: <<https://buyandsell.gc.ca/procurement-data/tender-notice/EPS-21-WS3005755777-Doc3010175405>>.

<sup>9</sup> Exhibit PR-2021-084-01.A at 2.

<sup>10</sup> In response to a request for information from the Tribunal, Eolyss stated that it became aware of the PWGSC evaluation grid on August 12, 2021, at the same time that it became aware of the Challenge. See, in this regard, Exhibit PR-2021-084-05.

<sup>11</sup> Exhibit PR-2021-084-01.A at 20–21.

<sup>12</sup> *Ibid.* at 50–55.

<sup>13</sup> *Ibid.* at 2 and at 18–49.

<sup>14</sup> *Ibid.* at 24–25.

<sup>15</sup> *Ibid.* at 2.

<sup>16</sup> Exhibit PR-2021-084-01 at 28.

<sup>17</sup> *Ibid.* at 27–28.

<sup>18</sup> Exhibit PR-2021-084-01.A at 95–102.

<sup>19</sup> *Ibid.* at 2.

[16] On March 8, 2022, PWGSC responded to Eolyss's objection by sharing the response of the IDEaS program, which stated that the additional information provided by Eolyss could not be considered and that the outcome of the analysis could not be changed at this stage. The response also noted that the awarded score reflected the technical evaluation of all elements of the proposal submitted by Eolyss, which had been evaluated by expert scientists and technicians from the research and defence community.<sup>20</sup>

[17] On March 17, 2022, Eolyss filed its complaint with the Tribunal.

[18] On March 18, 2022, the Tribunal requested additional information for the complaint to be considered complete, in accordance with subsection 30.11(2) of the CITT Act.<sup>21</sup> On March 19, 2022, Eolyss submitted the requested information. As a result, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on March 19, 2022.

[19] On March 24, 2022, the Tribunal decided not to conduct an inquiry into the complaint.

## ANALYSIS

[20] Pursuant to section 6 and 7 of the Regulations, after receiving a complaint that complies with subsection 30.11(2) of the CITT Act, the Tribunal must determine whether the following four conditions are met before it can conduct an inquiry:

- i. the complaint has been filed within the prescribed time limits;<sup>22</sup>
- ii. the complainant is a potential supplier;<sup>23</sup>
- iii. the complaint is in respect of a designated contract; and<sup>24</sup>
- iv. the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.<sup>25</sup>

[21] In this case, although the first ground of complaint appears to meet the first three conditions, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the relevant trade agreements. In addition, the Tribunal finds that the second ground of complaint was not filed within the time limits prescribed by section 6 of the Regulations.

### **The first ground of complaint does not disclose a reasonable indication of a breach of the relevant trade agreements**

[22] Pursuant to section 7(1)(c) of the Regulations, the Tribunal must determine whether the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been conducted in accordance with any trade agreement that may be relevant.

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<sup>20</sup> Exhibit PR-2021-084-01 at 24.

<sup>21</sup> Exhibit PR-2021-084-02.

<sup>22</sup> Subsection 6(1) of the Regulations.

<sup>23</sup> Paragraph 7(1)(a) of the Regulations.

<sup>24</sup> Paragraph 7(1)(b) of the Regulations.

<sup>25</sup> Paragraph 7(1)(c) of the Regulations.

[23] Eolyss does not mention any trade agreements in its complaint. The Tribunal nonetheless considered the relevant provisions of the Canadian Free Trade Agreement (CFTA).<sup>26</sup>

[24] As a first ground of complaint, Eolyss argues that the evaluators failed to take the entire proposal into consideration in their evaluation of each criterion, contrary to section 4.1.6 of the CFP. Specifically, Eolyss alleges that certain elements presented throughout various paragraphs were not considered by the evaluators. Moreover, Eolyss states that "...it is not always possible to provide a high level of precision on certain details that will be resolved only once the study has been fully completed" [translation].<sup>27</sup>

[25] The Tribunal believes it helpful to reproduce certain excerpts that describe the context in which the Challenge was issued, as well as other relevant information that was available to bidders.<sup>28</sup>

2.3.1 The RCN is committed to contributing toward reducing overall [GHG] emissions to meet the Greening Government Strategy net-zero 2050 commitment. To meet this commitment, it is imperative to first be able to accurately quantify the amount of energy used as well as the amount of GHG emitted across the RCN fleet. The capabilities to do so are constrained in part because the naval ships have varying instrumentations and designs, which make it difficult to capture the energy data needed. In addition, obtaining reliable measurements of energy consumption and GHG emission are challenging because of the range of conditions under which naval ships operate (e.g., calm vs. rough sea states, erratic operational patterns).

Moreover, the DND's ability to manage and forecast progress towards achieving net-zero GHG emission across the RCN fleet is constrained by a lack of energy data management infrastructure. Data integration and analysis are problematic given that naval ships are a mixture of technologies spanning multiple decades and there is no standardized format of record keeping as there is a mixture of analog and digital record keeping. In instances where handwritten record keeping is used, there is increased risk of data entry errors and the non-standardized format does not lend itself to data analytics.

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## 2.4. Essential outcomes

2.4.1 DND/[Canadian Armed Forces] are looking for innovative new systems and technologies.

Proposed solutions must:

- Measure energy consumption and GHG emissions across the fleet;
- Record, analyze, and monitor this energy consumption and GHG emission data; and

<sup>26</sup> Among other things, Article 515(4) of the CFTA provides that, to be considered for an award, at the time of opening, a bid must comply with the essential requirements set out in the tender notices and tender documentation, and must be from a supplier that satisfies the conditions for participation.

<sup>27</sup> Exhibit PR-2021-084-01.A at 5.

<sup>28</sup> *Ibid.* at 20–21.

- Allow for the visualization of the energy consumption and GHG emissions at the system, ship, class and fleet levels.

...

2.6.1 The RCN fleet to be considered for this challenge includes the existing Halifax Class vessels, Kingston Class vessels, ORCA class vessels, and the forthcoming Canadian Surface Combatant, Arctic and Offshore Patrol Ship (AOPS), and Joint Support Ship (JSS) vessels.

It is requested that innovators use the assumption that naval vessels are constrained to using conventional diesel fuel oils, and that significant changes to the existing propulsion systems are not practical.

[26] In this case, the Tribunal is not persuaded that the complaint discloses a reasonable indication of a breach of the relevant trade agreements.

[27] The Tribunal has repeatedly stated that it will not interfere with an evaluation unless it is unreasonable and will not substitute its judgment for that of the evaluators unless the evaluators 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 not conducted the evaluation in a procedurally fair way.<sup>29</sup>

[28] The Tribunal sees nothing in this complaint that could suggest that the evaluation of the bid was unreasonable or that it was conducted in breach of the CFTA.

[29] While Eolyss submits that the evaluators failed to consider information that was presented throughout its proposal contrary to section 4.1.6 of the CFP, that same section states that "... bidders should explicitly demonstrate, in sufficient detail, how all criteria are met . . ." [translator's note: the sentence "*les soumissionnaires devraient expliquer clairement et de façon suffisamment détaillée en quoi ils satisfont à tous les critères*" only appears in the French CFP and seems to have been omitted from the English CFP] and that "[n]o information will be inferred".<sup>30</sup> Similarly, section 4.2.1 states that "[t]he information provided must articulate how the proposed solution meets the criteria" and that bidders must "complete the Challenge event submission form with a degree of information sufficient to enable [the government institution]'s assessment of the proposal against the criteria and the evaluation schema".<sup>31</sup>

[30] It is incumbent upon bidders to exercise due diligence in the preparation of their proposals to ensure that they are compliant with all of the essential elements of a solicitation and that the

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<sup>29</sup> As the Tribunal stated in *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, "[the government institution]'s determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling." See also *Samson & Associates v. Department of Public Works and Government Services* (13 April 2015), PR-2014-050 (CITT), at paras. 35 *et seq.*; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (TCCE) at para. 52.

<sup>30</sup> Exhibit PR-2021-084-01.B at 14.

<sup>31</sup> *Ibid.*

information provided clearly demonstrates compliance with the established requirements. This principle is reflected in the CFP, under section 3.3.2, which reads as follows:<sup>32</sup>

Bidders are and will remain responsible for the accuracy and completeness of their proposals. Bidders should read all CFP documentation and Challenge event details in their entirety prior to submitting a proposal. In their proposal, Bidders should demonstrate their understanding of the requirements contained in the CFP and Challenge event, and explain how they will meet these requirements. Bidders should explicitly demonstrate their capability and describe their approach in a thorough, concise and clear manner for carrying out the work. The proposal should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the proposal will be evaluated.

[31] Following an in-depth analysis of the entire proposal, the Tribunal finds that there is little evidence that the evaluators failed to consider information provided by Eolyss in its proposal. Rather, the Tribunal is of the opinion that Eolyss's proposal, as submitted, unfortunately did not address in sufficient depth the points subject to the evaluation criteria to obtain the maximum score for the majority of the point-rated criteria. In several respects, the information provided is either insufficient, does not meet the required level of detail or precision or does not satisfy the point-rated criteria for Eolyss to obtain the maximum score. Indeed, the responsibility of demonstrating how the solution met the various criteria was upon Eolyss and Eolyss alone. Evaluators were not required to infer information or to fill in gaps. For the purposes of its analysis, the Tribunal will provide some examples below, which are not exhaustive.

[32] In order to achieve the maximum score for point-rated criteria PRC-1 (Scientific and/or Technical Merit of Proposed Solution) and PRC-3 (Impact of Proposed Solution), Eolyss was required to provide, in its proposal, information that would, on the one hand, demonstrate very clearly that the proposed solution was supported by scientific and technological concepts,<sup>33</sup> and on the other hand, demonstrate how the implementation of the proposed solution would contribute to enhancing the development of scientific and technical capability and to advance methods or technologies in the field specific to the Challenge.<sup>34</sup> It goes without saying that the assessment of the explanations surrounding scientific and technological concepts was important in the context of this Challenge, given the technological constraints of naval vessels and the established objectives.

[33] That said, the Tribunal notes, firstly, that few elements relating to the scientific and technological concepts behind the measurement of energy (or fuel) consumption were presented in sufficient detail. The description of the methods referred to in Eolyss's argument is not detailed and does not allow the Tribunal to find the evaluators' conclusion in this regard to be unreasonable.<sup>35</sup> Secondly, the proposal does not demonstrate clearly and in sufficient detail how the proposed solution will improve the development of scientific or technical capability. The excerpts cited by Eolyss in support of its argument do not allow the Tribunal to reach a different conclusion.<sup>36</sup>

[34] With regard to the point-rated criterion PRC-2 (Novel and Innovative Solution), while Eolyss was required to provide information in its proposal that would very clearly demonstrate that the

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<sup>32</sup> Exhibit PR-2021-084-01.B at 12.

<sup>33</sup> Exhibit PR-2021-084-01 at 40.

<sup>34</sup> *Ibid.* at 42.

<sup>35</sup> *Ibid.* at 21.

<sup>36</sup> *Ibid.* at 22.



proposed solution was novel over existing solutions,<sup>37</sup> the Tribunal is not convinced that the information provided did demonstrate this, as indicated by the evaluators in their justification,<sup>38</sup> especially since Eolyss states in its argument that the “. . . platform has already been built and will, in all likelihood, require only minor additions . . .” [translation].<sup>39</sup>

[35] With respect to point-rated criterion PRC-4 (Feasibility and Approach of Proposed Solution), to obtain the highest score, Eolyss was required to provide information to demonstrate the high probability that the proposed solution was feasible and will achieve the proposed objectives.<sup>40</sup> The Tribunal is not satisfied that this was demonstrated. In their justification, the evaluators stated that Eolyss’s proposal did not properly address the difficulties that might arise from applying the proposed solution on a warship, given potential problems related to Wi-Fi connectivity or interference with the ship’s systems.<sup>41</sup> The Tribunal can only note that the information contained in the proposal in this regard is insufficient. The mere fact of making a general reference to the use of an alternative cannot, in itself, be taken as sufficient.<sup>42</sup> Eolyss was responsible for providing a greater level of detail and explanation, especially since the solution it proposes involved the use of “Internet of Things”-type technologies.

[36] Finally, with respect to point-rated criterion PRC-6 (Alignment of Desired Outcomes), Eolyss was required to provide information to clearly demonstrate that the solution will achieve all desired outcomes.<sup>43</sup> The Tribunal found, as did the evaluators in this regard,<sup>44</sup> that the information provided in support of the proposal did not meet the level of precision required to demonstrate how the third outcome stated in the proposal would be clearly achieved. Indeed, once again, the mere reference to specifications in the marine environment and to components available on the market cannot, in itself, be taken as sufficient.

[37] In summary, the information provided in support of the proposal does not disclose a reasonable indication that the evaluation conducted by PWGSC was unreasonable or contrary to the criteria set out in the CFP.

[38] Based on the information available to bidders, the Tribunal is of the view that Eolyss had sufficient information that would allow it to submit a detailed bid in response to the Challenge. It is the bidder’s responsibility to ensure that the proposal demonstrates clearly and in sufficient detail how it meets the various point-rated criteria. Evaluators could not infer information or fill in the missing gaps.

[39] For these reasons, the Tribunal finds that the first ground of complaint does not disclose a reasonable indication of a breach of the relevant trade agreements.

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<sup>37</sup> *Ibid.* at 41.

<sup>38</sup> *Ibid.* at 21–22.

<sup>39</sup> Exhibit PR-2021-084-01.A at 15, 102.

<sup>40</sup> Exhibit PR-2021-084-01 at 43.

<sup>41</sup> *Ibid.* at 22.

<sup>42</sup> *Ibid.* at 22; Exhibit PR-2021-084-01.A at 24–25.

<sup>43</sup> Exhibit PR-2021-084-01 at 45.

<sup>44</sup> *Ibid.* at 22–23.

### **The second ground of complaint is time-barred**

[40] Pursuant to subsections 6(1) and (2) of the Regulations, a potential supplier must file an objection with the relevant government institution or file a complaint with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. In addition, a potential supplier who has made an objection with the relevant government institution within the prescribed time limit and is denied relief may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial.

[41] As a second ground of complaint, Eolyss is challenging the scoring system established by the government institution. Specifically, Eolyss argues that the scoring system, as set out in the evaluation grid (based on a scoring table consisting of only three or four possible ratings), is too rigid and may be biased and subjective. In its view, the scoring system should be modified to provide intermediate scores.

[42] In the Tribunal's view, there is no doubt that the date on which the basis of the complaint reasonably should have become known to Eolyss was when it became aware of the scoring system set out in the government institution's evaluation grid, which can normally be between the beginning of the bidding period and the bid closing date. In this case, Eolyss stated that it became aware of PWGSC's evaluation grid on August 12, 2021.<sup>45</sup> The Tribunal can only assume, based on the evidence submitted in support of the complaint, that no objection or complaint raising this ground was filed with the government institution or the Tribunal before the bid closing date, even though Eolyss had the opportunity to do so. On the contrary, Eolyss waited until March 19, 2022, in fact, to file this ground of complaint with the Tribunal.<sup>46</sup>

[43] Bidders cannot adopt a wait-and-see attitude and submit, after the fact, a ground of complaint that had to be reasonably known beforehand. In this regard, the Tribunal notes that bidders must be vigilant and react as soon as they become aware of, or reasonably should become aware of, a flaw in the process. Thus, it is the bidder's responsibility to consider any potential issues that may arise in a solicitation and to file complaints in a timely manner.<sup>47</sup>

[44] In light of the above, the Tribunal finds that the second ground of complaint was not filed within the prescribed time limits. Thus, the Tribunal is not required to determine whether the other conditions for initiating an inquiry are met.

### **Additional remarks**

[45] In its analysis, the Tribunal took for granted that the complaint was in respect of a designated contract, although there may be some doubt in this regard. Had the Tribunal found that Eolyss's complaint met all the conditions for inquiry and decided, incidentally, to initiate an inquiry, the Tribunal would have asked the parties to make submissions on whether the complaint effectively concerned a designated contract or whether it concerned a grants and contributions program or any

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<sup>45</sup> Exhibit PR-2021-084-05.

<sup>46</sup> The Tribunal notes that the second ground of complaint was not raised in the objection sent to the government institution on February 22, 2022; see, in this regard, Exhibit PR-2021-084-01.A at 95–102.

<sup>47</sup> *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284.

other form of government assistance, given that these programs are not within the jurisdiction of the Tribunal.

[46] In light of all the above reasons, the Tribunal will not inquire into the complaint.

### **DECISION**

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

Frédéric Seppey  
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Frédéric Seppey  
Presiding Member