



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2021-041

SoftSim Technologies Inc.

*Decision made  
Thursday, September 16, 2021*

*Decision issued  
Monday, September 27, 2021*

*Reasons issued  
Friday, October 1, 2021*

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

**BY**

**SOFTSIM TECHNOLOGIES INC.**

**AGAINST**

**THE NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL**

**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.

Susan D. Beaubien

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Susan D. Beaubien

Presiding Member

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

## STATEMENT OF REASONS

[1] SoftSim Technologies Inc. (SoftSim) has filed a complaint with the Canadian International Trade Tribunal concerning the procurement of programming and software development services for the Natural Sciences and Engineering Research Council of Canada (NSERC).<sup>1</sup>

[2] A Request for Proposal (RFP – Solicitation No. N22-19006) was issued pursuant to an existing Supply Arrangement (SA) for Task-Based Informatics Professional Services<sup>2</sup> on June 18, 2021, with a closing date of July 6, 2021.<sup>3</sup> The due date for the receipt of bids was subsequently extended to July 13, 2021.<sup>4</sup>

[3] According to the RFP, NSERC was seeking the services of “programmer/software developers – Level 2 & 3”. The RFP was intended to give rise to a one-year contract having options for three irrevocable one-year extensions, exercisable at NSERC’s discretion.<sup>5</sup> Fifteen companies that were pre-qualified under the SA were invited to submit proposals in response to the RFP. SoftSim was one of them.<sup>6</sup>

[4] Bidders were instructed by the RFP<sup>7</sup> to describe the resources that the bidder proposed to supply. Within the context of the RFP, a “resource” is understood to mean the expertise and services of specific, named individuals whose labour the bidder is in a position to supply to provide the services.

[5] The RFP included mandatory technical criteria with respect to the education, professional certifications, work experience and security clearance requirements of the resources to be provided by the winning bidder.<sup>8</sup> Each bidder was required to provide a certification asserting that, among other things, the described resources would be available to perform the work should the bidder win the tender and be awarded the contract.<sup>9</sup>

[6] During the course of the tender, NSERC answered several questions from prospective bidders seeking additional information on the specific type of experience required by proposed resource, the scoring criteria for certain requirements and how that scoring criteria would be applied.<sup>10</sup>

[7] SoftSim submitted a bid in response to the RFP.<sup>11</sup> Following a review of the received bids, NSERC awarded the contract to SoftSim. The contract was signed on or about August 4, 2021.<sup>12</sup>

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<sup>1</sup> Complaint, Exhibit PR-2021-041-01.

<sup>2</sup> Exhibit PR-2021-041-01 at 10.

<sup>3</sup> *Ibid.* at 10.

<sup>4</sup> Complaint, Exhibit PR-2021-041-01 at 78.

<sup>5</sup> *Ibid.* at 13.

<sup>6</sup> *Ibid.* at 15.

<sup>7</sup> *Ibid.* at 18–30.

<sup>8</sup> *Ibid.* at 31–37, 40.

<sup>9</sup> *Ibid.* at 38.

<sup>10</sup> *Ibid.* at 78–81.

<sup>11</sup> Exhibit PR-2021-041-01.A (protected) at 1.

<sup>12</sup> Exhibit PR-2021-041-01 at 5.

[8] SoftSim's bid indicated that it would be providing the services of an individual who will be referred to in these reasons as "T" in order to perform the services required by the contract.<sup>13</sup>

[9] On or about August 26, 2021, a meeting was held between NSERC personnel and T. The purpose of the meeting was ostensibly for the purpose of introducing T to the NSERC project. According to SoftSim, the meeting was very brief and the persons in attendance at the meeting were not forthcoming with T concerning the work to be done on the project.<sup>14</sup> During the course of that meeting, an issue apparently arose concerning the extent to which T had practical experience with certain software tools that integrate with Microsoft Dynamics. NSERC formed the view that T did not have the requisite experience mandated by the RFP with respect to those software tools and that his qualifications in that regard had been misstated.<sup>15</sup>

[10] No work was assigned to T pursuant to the contract. Despite an exchange of emails between SoftSim and NSERC seeking to resolve the matter,<sup>16</sup> NSERC issued a stop work order on August 31, 2021.<sup>17</sup>

[11] SoftSim filed a complaint with the Tribunal on September 2, 2021. Additional material was submitted on September 3, 8 and 9, 2021. The Tribunal acknowledged that SoftSim's complaint was complete on September 9, 2021.

[12] According to SoftSim, T had the requisite experience to perform the tasks needed for the project but simply expressed a preference for using alternative methods to achieve the desired end result. SoftSim further contends that NSERC personnel were uncooperative, if not hostile, to T's participation in the project, were favourably disposed to continuing the contract with the previous incumbent and were consequently advancing a pretext from preventing T from working on the project.<sup>18</sup>

## ANALYSIS

[13] The Tribunal's authority to conduct inquiries concerning procurement matters arises from the *Canadian International Trade Tribunal Act*<sup>19</sup> and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>20</sup>

[14] The *Act* and *Regulations* prescribe certain conditions that must be present before the Tribunal can commence an inquiry into a complaint, namely:

- (a) The complaint must be timely. Subsection 6(1) of the *Regulations* prescribes that a complaint must be filed within 10 working days of the date when the complainant knew or should have reasonably known about the basis of a complaint;

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<sup>13</sup> Exhibit PR-2021-041-01.A (protected) at 16, 107–171.

<sup>14</sup> *Ibid.* at 21.

<sup>15</sup> *Ibid.* at 28.

<sup>16</sup> *Ibid.* at 39–106.

<sup>17</sup> *Ibid.* at 28.

<sup>18</sup> *Ibid.* at 21, 39–106.

<sup>19</sup> R.S.C., 1985, c. 47 (4th Supp.) [*Act*].

<sup>20</sup> SOR/93–602 [*Regulations*].

- (b) The complaint must pertain to a “designated contract” within the meaning of the *Act* and *Regulations*;
- (c) The complaint must be filed by a “potential supplier” of the goods and services being procured;
- (d) There must be a reasonable indication that the procurement has not been conducted in accordance with applicable trade agreements.

[15] All of these conditions must be present.

[16] The Tribunal concludes that SoftSim’s complaint is timely. The basis for SoftSim’s complaint is its contention that the stop work order was wrongly issued. The complaint process was initiated on September 2, 2021, three days after SoftSim was informed that a stop work order had been issued.

[17] A complaint must also pertain to a “designated contract”<sup>21</sup>. The RFP seeks to procure services, and the value of the contract meets the threshold prescribed by the *Regulations*. As such, the Tribunal finds that the RFP relates to a “designated contract” within the meaning of the *Act* and the *Regulations*.<sup>22</sup>

[18] As SoftSim submitted a bid in response to the RFP, it fulfills the requirement of being a “potential supplier” and thus has standing to bring this complaint.

[19] The Tribunal now turns to consider whether there is a “reasonable indication” that the procurement has not been conducted in accordance with the trade agreements. In this case, the trade agreement that is relevant to the RFP at issue is the Canadian Free Trade Agreement.<sup>23</sup>

[20] The trade agreements (notably the CFTA, which applies here) require that procurements, including the evaluation of received bids, be conducted fairly, openly and transparently, in accordance with the terms prescribed by the tender documents.

[21] However, it is well established that the Tribunal’s jurisdiction is limited to oversight of the procurement process. It does not extend to issues or disputes that may arise after the procurement process has concluded and which are matters of contract administration. This principle was summarized by the Tribunal in *Sunny Jaura Enterprises*:

The *CITT Act* and the *Regulations* allow a potential supplier to complain to the Tribunal about any aspect of a procurement process for a designated contract. When applying these provisions, the Tribunal has made an important distinction between the procurement process and contract administration. The procurement process begins after the government institution has decided on its procurement requirement and continues through to the awarding of the contract. Contract administration is a separate phase that takes place after the procurement process is completed. It deals with issues that arise as a contract is performed and managed.

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<sup>21</sup> As defined by s. 30.1 of the *Act*.

<sup>22</sup> *Regulations*, s. 7(1).

<sup>23</sup> Canadian Free Trade Agreement, online: Internal Trade Secretariat <[https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English\\_September-24-2020.pdf](https://www.cfta-alec.ca/wp-content/uploads/2020/09/CFTA-Consolidated-Text-Final-English_September-24-2020.pdf)> (entered into force 1 July 2017) [CFTA].

The Tribunal has been clear that matters of contract administration are beyond the scope of its jurisdiction.<sup>24</sup>

[Footnote omitted]

[22] As such, the Tribunal has concluded that it lacks jurisdiction to inquire into complaints where an unsuccessful bidder complains that the winning bidder is unqualified or will be unable to supply the goods and services being procured. Such allegations are inherently speculative.

[23] If the winning bidder does not adhere to or deliver what it has promised in its bid or otherwise fails to perform its obligations under the contract, the procuring entity may seek a remedy under contract law, up to and including termination of the contract. These remedies fall outside the Tribunal's jurisdiction. They do not give rise to a remedy that may be claimed before the Tribunal by a bidder that was unsuccessful during the procurement process.

[24] However, the Tribunal has recognized an exception to this principle. In circumstances where the procuring entity accepts goods or services from a winning bidder that contradict the terms and conditions of the tender, it may be found to have conducted a new and different procurement after the fact. This is inherently unfair to the other bidders who were unsuccessful during the tender process. The Tribunal has exercised its jurisdiction in such situations because they raise issues concerning the procurement process itself, as opposed to an issue as to whether the winning bidder is complying with the terms of the contract that has been awarded to it. As noted by the Tribunal in *Eclipsys*:

The Tribunal has generally drawn a line between the procurement process and contract administration by considering whether the procuring entity took actions that effectively changed the terms of the mandatory requirements after the contract had been awarded, for example, by accepting goods that were either substantially different from, or contradictory to, the mandatory requirements of the original solicitation. In those exceptional cases where such actions had taken place, the Tribunal found that it could inquire into whether the procuring entity effectively conducted a new procurement process for a different good or service and thereby claim jurisdiction over the complaint as a result.<sup>25</sup>

[Footnote omitted]

[25] In circumstances such as those described in *Eclipsys*, the complaint is not rooted in contract administration. If the procuring entity has ignored the terms of its own procurement and accepted goods or services that are clearly different, an unsuccessful bidder may complain to the Tribunal about the fairness of the procurement process. If appropriate, the Tribunal may then recommend that a new tender process be commenced.

[26] These circumstances do not apply to the complaint at issue in these proceedings. SoftSim was the successful bidder. It filed a bid in response to the RFP and addressed the mandatory technical criteria prescribed by the RFP. SoftSim provided a description of the education, skills and experience of its resource, together with a certification that the resource would be available to provide the

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<sup>24</sup> *Sunny Jaura o/a Jaura Enterprises* (21 February 2013), PR-2012-043 (CITT) at para. 10; also see *Custom Power Generation* (23 February 2021), PR-2020-087 (CITT) at para. 8.

<sup>25</sup> *Eclipsys Solutions Inc.* (21 March 2016), PR-2015-038 (CITT) at para. 39; see also *Vidéotron Ltée* (22 October 2018), PR-2018-006 (CITT) at para. 16.

services if the contract were to be awarded to SoftSim. In the exercise of its discretion, NSERC accepted these representations and the certification provided by SoftSim.

[27] There is no issue or complaint concerning NSERC's evaluation of SoftSim's bid or of its decision to award the contract to SoftSim. Rather, the Tribunal concludes that an issue has arisen concerning the performance of the contract.

[28] NSERC contends that SoftSim's resource lacks the experience or skills to perform the work described by the tender and incorporated into the contract. For its part, SoftSim disputes this allegation. It argues that NSERC is either asking for work to be performed that falls outside the scope of the contract or is seeking a pretext to wrongly terminate the contract in order to favour the previous incumbent.

[29] These allegations pertain directly to the terms and conditions of the contract itself. Accordingly, the dispute is one of contract administration. To the extent that either party may be entitled to a remedy, it arises from contract law and not from any breach of the trade agreements.

[30] The Tribunal thus lacks jurisdiction to decide these issues, which fall to be determined in another forum having jurisdiction over contractual disputes. For the same reasons, the Tribunal does not have the jurisdiction to provide the remedy sought by SoftSim, namely the rescission of the stop work order.

## DECISION

[31] For the above reasons, the Tribunal has decided not to hold an inquiry and dismisses the complaint, having regard to subsections 30.13(1) and 30.13(5) of the *Act*.

Susan D. Beaubien

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Susan D. Beaubien  
Presiding Member