CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, July 29, 2002

File No. PR-2002-006

IN THE MATTER OF a complaint filed by XIA Information Architects Corporation under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

The Canadian International Trade Tribunal determines that the Department of National Defence erred in assessing that the experience of XIA Information Architects Corporation did not meet the requirements of the evaluation criteria stipulated in section 23.2 of the Request for Proposal. Accordingly, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of National Defence re-evaluate the proposals in accordance with the evaluation criteria set out in the Request for Proposal and in this determination.

If, after re-evaluation, the proposal of XIA Information Architects Corporation is determined to be the successful proposal, the Canadian International Trade Tribunal recommends the following:

1. that XIA Information Architects Corporation be compensated for the profits that it would have made during the firm first year of the contract, but for the breach of Article 506(6) of the *Agreement on Internal Trade* by the Department of National Defence;
2. that the last two option years contemplated under the current contract not be exercised; and
3. that a firm one-year contract, with an option year, be awarded to XIA Information Architects Corporation, effective April 1, 2003, or, in the alternative, that the work subject to this procurement be re-competed at the end of the first year of the current contract.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards XIA Information Architects Corporation its reasonable costs incurred in relation to preparing and proceeding with the complaint.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Date of Determination:	July 29, 2002
Date of Reasons:	August 1, 2002
Tribunal Member:	Zdenek Kvarda
Investigation Officer:	Peter Rakowski
Counsel for the Tribunal:	Clarissa Lewis
Complainant:	XIA Information Architects Corporation
Government Institution:	Department of National Defence

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, August 1, 2002

File No. PR-2002-006

IN THE MATTER OF a complaint filed by XIA Information Architects Corporation under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

On April 29, 2002, XIA Information Architects Corporation (XIA) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*[1] concerning the procurement of professional services (Solicitation No. DND-01/0336) by the Department of National Defence (DND).

XIA alleged that, contrary to the provisions of the *Agreement on Internal Trade*,[2] DND used inappropriate evaluation criteria, biased tender specifications and ambiguous or indefinite evaluation factors.

XIA requested, as a remedy, that the Request for Proposal (RFP) be cancelled and that the solicitation be re-tendered and requested that the re-tendering process be undertaken under the oversight of the Department of Public Works and Government Services using clear, unambiguous and fair evaluation criteria.

On May 7, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[3] That same day, the Tribunal issued an order postponing the award of any contract[4] in relation to the solicitation until the Tribunal determined the validity of the complaint. On May 31, 2002, DND filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[5] On June 11, 2002, XIA filed comments on the GIR with the Tribunal.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [hereinafter AIT].
3. S.O.R./93-602 [hereinafter Regulations].
4. The contract was awarded to 3653846 Canada Inc. (QRW Technologies). It was anticipated that this contract would be a one-year contract with two one-year options. Given that DND was advised of a possible complaint to the Tribunal, a three-month contract, with options of nine months, and two one-year options were established in April 2002.
5. S.O.R./91-499.

333 Laurier Avenue West
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(613) 990-2452 Fax (613) 990-2439

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Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

The Directorate of Technical Information and Cataloguing Services (DTICS) is the technical authority and repository manager of DND technical information and other related data. DTICS had initiated a project called PARAGON to replace the existing document management and publishing tools with a configurable commercial off-the-shelf (COTS) solution. An RFP for the services of an information and project specialist was issued and posted on MERX, on September 25, 2001. The scheduled closing date of the RFP was November 6, 2001. Subsequent supplier questions regarding this RFP resulted in its cancellation on November 1, 2001.

The RFP was revised and re-posted on MERX on January 31, 2002, with a scheduled closing date of March 12, 2002. One of the revisions to the RFP was in response to XIA's request to permit comparable product experience to be deemed acceptable in meeting the mandatory requirements. Instead of requiring experience with the named products only, the RFP was re-written to allow for equivalent experience in using information management systems. The original wording of section 23(iii) found in the mandatory requirements of the RFP was as follows:

> Experience with Technical Information Asset Managers such as Intergraph AIM, Autotrol CENTRA 2000, Xerox Documentum.

This was subsequently revised to section 23.2 of the RFP which reads, in part, as follows:

- One year experience in the use of Information Management Systems such as: Intergraph – AIM, Autotrol – CENTRA 2000, Xerox – Documentum and the Hummingbird software suite (e.g. DOCS OPEN, DOCS RM, DOCS ROUTING etc.).

Two proposals were submitted in response: one from 3653846 Canada Inc. (QRW Technologies) and one from XIA. DTICS evaluated the bids and found XIA's bid non-compliant, as it had not provided evidence that it had the above-mentioned experience.

DTICS explained the reasons for its finding of non-compliance to the Director of Contracting Policy (DC Pol) in an e-mail dated March 22, 2002, which stated the following:

> This RFP is seeking to retain an individual with skills to manage a broad range of documents and publications. With the exception of a small self-developed application (On-Line Drawing Access System), all references to the work experience of the proposed individual are limited to applications based on XML and SGML. The proposal does not meet the mandatory requirement for having experience with any product that does Product Data Management (PDM) (eg. Autotrol's Centra 2000), or any product that manages unstructured documents including a Records Management capability (eg. the Hummingbird suite).

In response to additional questions from the DC Pol, DTICS further expanded on its use of examples listed in the mandatory criteria, stating that the examples included generic document management systems (Documentum and AIM), as well as the special functionality required (PDM and Workflow from Centra and Records; and Routing and Imaging from Hummingbird).

A letter advising XIA that its bid was non-compliant was sent on April 10, 2002.[6] The letter stated that the technical evaluation team had determined that the mandatory criteria found in section 23.2 was not met with respect to the special functionality requirement for experience in the "Product Data Management in Centra and Records Management, and Imaging in the Hummingbird suite."

Upon receiving the letter, XIA outlined its concerns with the outcome of the technical evaluations to DND.[7] Specifically, XIA stated that the rationale for deeming the proposed candidate non-compliant was not, in any way, supported by the requirement, as stated in the RFP. According to XIA, the RFP did not require, explicitly or implicitly, the "special functionality requirement" for experience with "Product Data Management in Centra" and "Records Management and Imaging in the Hummingbird suite" identified in the rationale for deeming its bid non-compliant. XIA further stated that the RFP did not suggest that these elements needed to be addressed in the response or manifest themselves in the experience of the proposed candidate. Rather, XIA submitted that the experience stated was for "use of Information Management Systems" and the listing provided was prefaced with "such as", which means, in terms of strict grammatical usage, a "non-comprehensive listing of examples." XIA also stated that, as the rationale provided for declaring its proposal non-compliant is inapplicable, then the consequence is that both proposals are compliant and should be subjected to a rated evaluation.

On April 29, 2002, XIA filed its complaint with the Tribunal.

POSITION OF PARTIES

XIA's Position

XIA submitted that, during the evaluation process, DND redefined the meaning of a mandatory requirement in the solicitation and did so using a wrong interpretation of the solicitation requirement. As a result, the bid submitted by XIA was declared non-compliant. XIA submitted that the redefinition of the solicitation requirement during the evaluation process was unfair and that the interpretation being used to support the redefinition of the solicitation requirement was based on a faulty use of the English language.

XIA submitted that the requirements of the RFP did not explicitly limit the information management systems with which experience must be demonstrated to those that are COTS products. XIA also submitted that, in the absence of such explicit criteria, disqualifying experience obtained by the proposed resource in developing and deploying custom information management systems within military technical information management environments does not make sense. XIA submitted that this was especially true when it considered that the experience gained in developing and deploying these information management systems demanded a level of technical and procedural knowledge far greater than that of a casual system "user".

In addition, XIA submitted that the interpretation now being applied by DND to the subject requirement emphasizes the necessity that the experience proposed be gained using COTS information management systems similar to those cited as examples in the RFP. XIA maintained that, in responding to the subject requirement, over one year of experience was identified for the proposed candidate using the COTS information management system WorkSMART, a commercial information and workflow automation product provided by InfoDesign Corporation. According to XIA, this application was disqualified by the evaluation team for being "limited to applications based on XML and SGML," which,

6. GIR, Annex E.
7. GIR, Annexes F, G, H, I.

XIA submitted, is untrue. XIA submitted that WorkSMART is deployed as an information management system and workflow automation environment by the U.S. military, as well as by such commercial organizations as United Airlines, General Electronic and Hewlett-Packard. XIA further stated that, in addition to the experience cited with WorkSMART, experience using other COTS information management systems, such as Chrystal Astoria, Eidon Xbase and LivePage, was identified for the candidate in XIA's proposal. According to XIA, while each of these products can store and manage SGML/XML documents, they are routinely used to store and manage a variety of information objects, including standard office documents, and these are completely comparable to those listed in the subject requirement. XIA further submitted that, contrary to the position taken by DND that the information management systems cited in XIA's proposal "are not equivalent in functionality to those listed", the product experience cited is, in fact, exactly and, in many ways, more advanced than that cited in the RFP.

XIA submitted that DND is in error when contending that the experience of its candidate would be wholly inapplicable, as would be the case if experience in Excel, a spreadsheet product, was cited in response to a word processing requirement. According to XIA, the products cited by it subsume and surpass those requested and are not different in kind. XIA submitted that, by DND's own analogy, the experience that it proposed for this requirement for experience in information management systems is completely compliant.

DND's Position

It is DND's position that it did not add or redefine any additional functionality requirements, nor did it employ a faulty interpretation of the words "such as" in effecting the evaluation. DND submitted that the matter is one of lack of experience on the part of XIA in the areas required. According to DND, the experience cited by XIA is not equivalent to the requirement specified in the RFP. DND used the analogy that it is as if it had requested that "the bidder have experience in the use of word processing software, such as Word and WordPerfect" and the bidder had submitted that it had experience with Excel. DND also stated that, if the bidder had submitted experience with WordPro, it would be found compliant. According to DND, the experience cited by XIA was with programs that are not equivalent in functionality to those listed.

DND submitted that any information management system could have been proposed to demonstrate compliance. However, according to DND, the system had to meet DOCS OPEN, DOCS RM, DOCS ROUTING functionality and that the examples listed in the RFP cited the functionality required, otherwise, they would not have been included. DND quoted section 13 of the RFP, which states, in part: "DTICS has initiated a project called PARAGON to replace the existing document management and publishing tools with a configurable Commercial-off-the-shelf (COTS) solution(s)." DND stated that its position was to use a configurable COTS solution. Therefore, with respect to the first objection, DND submitted that its definition of the mandatory requirement was always for experience with configurable COTS products that provided electronic document management (EDM), product data management (PDM) and document management/record management (DM/RM) functionality. According to DND, the "such as" products listed are all COTS information management systems that can be configured to address the requirements of corporate EDM, PDM and/or DM/RM. DND maintained that, through the RFP, it was looking for a resource with experience working with any of the products listed or, because of the use of "such as", experience with any other configurable COTS product of the same type. This, it stated, would give the PARAGON project some first-hand experience with implementing configurable COTS solutions.

Based on the proposal submitted, DND stated that the proposed candidate lacked experience working with configurable COTS information management system products. DND stated that it informed XIA that its proposal did not address the functionality required with respect to the information management systems listed in its proposal. According to DND, no undisclosed criteria were applied to XIA's bid.

Regarding the allegation that DND used a "specious interpretation of the solicitation requirement", DND stated that the technical evaluation team was interpreting "such as" to mean "similar to". The Oxford dictionary's definition "of the same kind or degree" was taken to mean examples of products that are COTS, are configurable and are associated with EDM, PDM and/or DM/RM. DND was of the view that this interpretation of "such as" is one correct version. DND took the position that, even if XIA is correct with respect to its interpretation of "such as", which it takes to mean "for example", it leads to the same conclusion that the bidder had to demonstrate that it had experience with systems equivalent to those listed.

DND submitted that the solicitation was conducted in an open and fair manner. According to DND, in retendering the requirement, it did not specify experience with a specific product, but with a type of COTS product so that a company could have proposed any resource with one year's experience with a configurable COTS EDM, PDM and/or DM/RM product and successfully meet the criteria.

DND submitted that, to ensure fairness, the RFP process at DND also permits written questions and clarifications about the RFP to be submitted, with responses published on MERX and distributed to all bidders in receipt of a bid package. It further stated that bidders responding to this RFP were advised, in section 13 of the RFP, that DND was looking for support with respect to implementing PARAGON using a configurable COTS solution. According to DND, if XIA was uncertain as to the requirement, it could have submitted a question as part of the RFP process. It is DND's position that the requirement was clearly set out in the RFP.

TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the 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. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the trade agreements, which, in this instance, are the *North American Free Trade Agreement*[8] and the AIT.

The subject requirement of section 23.2 of the RFP reads as follows:

- One year experience in the use of Information Management Systems such as: Intergraph – AIM, Autotrol – CENTRA 2000, Xerox – Documentum and the Hummingbird software suite (e.g. DOCS OPEN, DOCS RM, DOCS ROUTING etc.).

In its bid, XIA described that the experience of its proposed candidate was with custom developed information management systems and the COTS information management system WorkSMART (a commercial information and workflow automation product provided by InfoDesign Corporation), Chrystal Astoria, Eidon Xbase and LivePage.

8. 32 I.L.M. 289 (entered into force 1 January 1994).

DND assessed that XIA's proposal did not meet the mandatory requirement for having experience with any product that does PDM (e.g. Autotrol's Centra 2000) or any product that manages unstructured documents, including an RM capability (e.g. the Hummingbird suite). DND stated, in the GIR, that it was looking for a resource with experience working with any of the products listed or, alternatively, if the words "such as" are interpreted to mean "for example", experience with any other configurable COTS product of the same type. DND submitted that, based on the proposal submitted, XIA's proposed candidate did not have experience with systems listed as examples in the proposal and failed to demonstrate experience with systems equivalent to those listed.

In determining the meaning of the requirement, the Tribunal observes that neither the subject requirement nor any other requirement presented in the mandatory criteria outlined in section 23.2 of the RFP indicates a clear and specific requirement for experience with certain COTS systems. Although DND indicated that section 13 of the RFP reads: "DTICS has initiated a project called PARAGON to replace the existing document management and publishing tools with a configurable Commercial-off-the-shelf (COTS) solution(s)", the detailed experience requirements do not explicitly mention that experience with certain COTS systems is necessary. Even though the examples cited in the subject requirement may have all been COTS systems, the onus is on DND to describe precisely the salient features that would be used to measure equivalence. The Tribunal notes that the definition of the words "such as" was discussed by the parties at some length. In the Tribunal's opinion, the fact remains that a reasonable interpretation applied to these words does not lead to the conclusion that experience with a specific configurable COTS product, or with certain features of the example systems listed in the subject requirement, is a mandatory requirement.

Accordingly, the Tribunal determines that DND erred in deciding that the experience of XIA's proposed candidate did not meet the requirements of the subject requirement in section 23.2 of the RFP and in declaring XIA's bid non-compliant on that basis.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the applicable trade agreements and, therefore, that the complaint is valid.

The Tribunal determines that DND erred in assessing that XIA's experience did not meet the requirements of the evaluation criteria stipulated in subsection 23.2 of the RFP. Accordingly, pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that DND re-evaluate the proposals in accordance with the evaluation criteria set out in the RFP and in this determination.

If, after re-evaluation, XIA's proposal is determined to be the successful proposal, the Tribunal recommends the following:

1. that XIA be compensated for the lost profits that it would have made during the firm first year of the contract, but for the breach of Article 506(6) of the AIT by DND;
2. that the last two option years contemplated under the current contract not be exercised; and
3. that a firm one-year contract, with an option year, be awarded to XIA, effective April 1, 2003, or, in the alternative, that the work subject to this procurement be re-competed at the end of the first year of the current contract.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards XIA its reasonable costs incurred in relation to preparing and proceeding with the complaint.

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Presiding Member