



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2014-027

Ottawa Mortuary Services Ltd.

*Decision made  
Thursday, September 18, 2014*

*Decision issued  
Friday, September 19, 2014*

*Reasons issued  
Tuesday, September 30, 2014*

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**

**OTTAWA MORTUARY SERVICES LTD.**

**AGAINST**

**THE DEPARTMENT OF HEALTH**

**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.

Jason W. Downey

Jason W. Downey  
Presiding Member

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

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (the 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 COMPLAINT

2. This complaint relates to a procurement (Solicitation No. 1000158349) by the Department of Health (Health Canada) for funeral transport services to support the national surveillance of Human Prion Diseases (CJD).

3. Ottawa Mortuary Services Ltd. (OMS) submitted a proposal, which was found to be non-compliant for failing to comply with a mandatory requirement. OMS raised the following grounds in its complaint:

- its proposal was improperly evaluated and declared non-compliant;
- Health Canada personnel were unavailable for discussion after it received a rejection letter; and
- it encountered difficulties becoming a member of the Funeral Service Association of Canada (FSAC).

4. As a remedy, OMS requested the postponement of the contract award and a re-evaluation of its proposal. OMS also requested an explanation for a telephone call it received from the winning bidder on behalf of the FSAC prior to the award of the contract.

### BACKGROUND TO THE COMPLAINT

5. On June 19, 2014, the Request for Proposal (RFP) was published on MERX. The bid closing date was July 28, 2014.

6. On August 27, 2014, Health Canada sent a letter to OMS informing it that its bid did not meet Mandatory Requirement MT7 because its bid failed to demonstrate or show proof of the necessary experience. The bid was rejected, and the financial component of the bid returned unopened to OMS.

7. According to the complaint, OMS received the rejection letter on September 2, 2014. OMS then made several telephone calls to relevant Health Canada officials with the intention of filing an objection. Also according to the complaint, OMS had not heard back from any Health Canada officials at the time of filing the present complaint with the Tribunal on September 16, 2014.

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

## ANALYSIS

8. Upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether the following four conditions have been met before an inquiry can be conducted:

- whether the complaint was filed within the time limits prescribed by section 6 of the *Regulations*;
- whether the complainant is an actual or potential supplier;
- whether the complaint is in respect of a designated contract; and
- whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>3</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>4</sup> the *Agreement on Government Procurement*,<sup>5</sup> Chapter Kbis of the *Canada-Chile Free Trade Agreement*,<sup>6</sup> Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,<sup>7</sup> Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*<sup>8</sup> or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*<sup>9</sup> applies.

9. In the Tribunal's view, the first three conditions have been met: the complaint was filed within the prescribed 10 working days; OMS is a potential supplier; and the complaint is in respect of a designated contract covered by the listed trade agreements, with the exception of the *AGP*.

10. None of the three grounds of complaint described by OMS, however, establishes a reasonable indication of a breach of the relevant trade agreements. Below is the Tribunal's analysis of these grounds, considered in turn.

### **Did Health Canada Improperly Declare OMS's Bid Non-compliant With a Mandatory Requirement of the RFP?**

11. OMS's first ground of complaint is that Health Canada ought to have considered OMS compliant with Mandatory Criterion MT7 based on the information provided in its bid.

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3. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [*AIT*].

5. *Protocol Amending the Agreement on Government Procurement*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> (entered into force 6 April 2014) [*AGP*].

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*]. Chapter Kbis, entitled "Government Procurement", came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [*CCOFTA*].

9. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013) [*CPAFTA*].

12. Mandatory Criterion MT7 states “[t]he bidder must have a minimum of 10 years’ experience, expertise, training and certification in the care and handling of cadavers of persons dying of infectious diseases, including CJD. Proof required.” The Tribunal notes that of the 10 mandatory technical criteria listed in the solicitation documents, 4 specifically provide that proof is required.

13. The Bid Submission Requirements of the RFP make it clear that all mandatory criteria *must* be met for the bid to be given consideration. Section 4.1 of the RFP states that, “[i]f the mandatory technical criteria are not met[,] the bid will be given no further consideration.”

14. The Evaluation Criteria section of the RFP further explains that “[t]he onus is on the Bidder to ensure that its bid is complete, clear, and provides sufficient detail for the evaluation committee to evaluate the bid.” Section 6.1 of the RFP specifies that “[t]he Bidder must provide the necessary documentation to support compliance. Bids which fail to meet the mandatory criteria will be declared non-responsive.”

15. The relevant trade agreements emphasize the importance of evaluating bids consistently with the requirements in the bid solicitation documents. For example, Article 1015(4)(d) of *NAFTA* provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.” Article 506(6) of the *AIT* provides that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria” [footnote omitted]. *The other trade agreements contain similar provisions.*

16. It is well established that bidders bear the onus of demonstrating compliance with the mandatory criteria, and that it is “. . . 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.”<sup>10</sup>

17. The wording of Mandatory Criterion MT7, particularly when read in conjunction with the Bid Submission Requirements and Evaluation Criteria, makes it clear that a bidder *must show* proof that it has 10 years of *experience, expertise, training and certification in the care and handling* of cadavers of persons dying from infectious diseases, *including CJD*, in order for a bid to be considered compliant.

18. In its bid, OMS indicated that it had many experienced personnel and identified one of its shareholders as a licensed funeral director for the past 34 years, during which time it is claimed that he met the requirements listed in Mandatory Criterion MT7, including the handling of infectious disease cases. As proof, OMS attached a copy of the individual’s licence for the current year.

19. The Tribunal finds that the information provided by OMS in its bid is clearly insufficient to demonstrate compliance with the various elements of Mandatory Criterion MT7. In particular, while the licence provided by OMS demonstrates the current certification status of the licence holder, it is not proof that he held the required certification for a period of at least 10 years.

20. In reaching this conclusion, it is not necessary for the Tribunal to determine whether the individual’s qualifications met Mandatory Criterion MT7, or even whether a copy of his licence was sufficient proof of the required experience, expertise, or training, because the one-year licence does not

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10. *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13. In that case, the Tribunal also found that, while a procuring entity may in some circumstances seek clarification of a particular aspect of a proposal, it is not under any duty to do so.

demonstrate that the said certification had been held for a period of 10 years or more. Therefore, on the very face of the information provided in the complaint, there is no reasonable indication that this aspect of OMS's bid was not properly evaluated.

### **Did Health Canada Fulfil Its Obligations Under the Applicable Trade Agreements to Provide OMS With a Debriefing?**

21. OMS's second ground of complaint is that it was unable to contact Health Canada officials after receiving its rejection letter. According to the complaint, the Senior Procurement and Contracting Officer (listed as the RFP authority in the RFP and the signatory of OMS's rejection letter) was unresponsive to telephone calls, and his voicemail indicated that he had left his position. His replacement was also unresponsive to telephone calls, and has allegedly also left Health Canada. The Tribunal must consider whether this inability to contact Health Canada officials amounts to a failure on the part of Health Canada to provide OMS with a debriefing.

22. The trade agreements applicable to this procurement, with the exception of the *AIT*, impose an obligation on the procuring entities to provide pertinent information to unsuccessful bidders. Article 1015(6)(b) of *NAFTA* provides as follows:

6. An entity shall:

...

(b) on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

23. The Tribunal has previously held that compliance with the provisions of Article 1015(6)(b) of *NAFTA* is to be determined in light of the particular circumstances of each case.<sup>11</sup>

24. The RFP specified that the winning bid would be the responsive bid meeting all of the mandatory requirements of the RFP with the lowest price. In this case, the advantage of the winning bid is its lower price, not the characteristics or advantages of the products offered; therefore, the relevant information that Health Canada needed to provide to OMS was the name of the winning bidder and the amount of the winning bid. Health Canada provided this information to OMS in the letter dated August 27, 2014. While it certainly would have been preferable for Health Canada officials to be available to respond to questions from disqualified bidders, such as OMS, the Tribunal finds, according to the unique facts of the present case and in light of the Tribunal's earlier discussion of Mandatory Criterion MT7, that the August 27, 2014, rejection letter satisfies Health Canada's minimum debriefing obligations under the trade agreements. Such a conclusion might not be reached in all cases where procurement officers are so unresponsive.

### **Do the Circumstances Surrounding OMS's Application for Membership in the FSAC Indicate a Breach of the Applicable Trade Agreements by Health Canada?**

25. OMS's third ground of complaint relates to a telephone call that it received prior to bid closing, from the company who turned out to be the winning bidder, regarding OMS's application for membership in the FSAC.

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11. *1091847 Ontario Ltd.* (12 March 2013), PR-2012-046 (CITT) at para. 22; *Ecosfera Inc. v. Department of the Environment* (11 July 2007), PR-2007-004 (CITT) at para. 33.

26. In its complaint, OMS makes reference to procedural difficulties in attaining this membership. These difficulties do not appear to involve Health Canada but instead relate to the actions of another party. In fact, the complaint does not provide any specific arguments or evidence as to how these alleged irregularities may constitute a reasonable indication of impropriety on the part of Health Canada. The Tribunal has consistently held that mere allegations are insufficient to substantiate a claim.<sup>12</sup>

27. It is also worth noting that while membership in either the FSAC or the National Funeral Directors Association was a mandatory requirement of the RFP, the rejection letter that OMS received from Health Canada states only one reason why OMS's bid was rejected—failure to show proof that the firm had 10 years of experience as required by Mandatory Criterion MT7. There is nothing in the complaint or the rejection letter to suggest that the disqualification of OMS's bid was in any way related to this membership requirement.

28. In light of the foregoing, the Tribunal finds that the information provided by OMS does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements.

## DECISION

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

Jason W. Downey  
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Jason W. Downey  
Presiding Member

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12. *Greenline Systems Canada ULC* (4 April 2014), PR-2013-049 (CITT) at para. 20; *Veseys Seeds Limited, doing business as Club Car Atlantic* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc.* (25 January 2013), PR-2012-040 (CITT) at para. 35; *Manitex Lifiking ULC* (19 March 2013), PR-2012-049 (CITT) at para. 22.