



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2014-038

Sepha Catering Ltd.

*Decision made
Thursday, November 13, 2014*

*Decision issued
Friday, November 14, 2014*

*Reasons issued
Tuesday, November 25, 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

SEPHA CATERING LTD.

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.

Serge Fréchette

Serge Fréchette
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*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² 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.

2. The complaint relates to a procurement (Solicitation No. 21401-145333/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Correctional Service of Canada (CSC) for the provision of frozen Kosher food products. The procurement is a Request for a Standing Offer (RFSO) to establish up to two Regional Individual Standing Offers for the provision of such products on an “as and when” requested basis to CSC’s institutions located in the Kingston and Gravenhurst, Ontario, areas.

3. Sepha Catering Ltd. (Sepha) alleged that the contract was improperly awarded to a company that is not licensed by the Canadian Food Inspection Agency (CFIA) or the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) to supply the required food products. According to Sepha, the RFSO required bidders to demonstrate that they were in compliance with the applicable federal and provincial laws, and the winning bidder has not complied with those laws. As a remedy, Sepha requested that PWGSC cancel the contract and award it to a company that is licensed either by the CFIA or OMAFRA.

BACKGROUND

4. The chronology of events that led to the filing of the present complaint is summarized in the following paragraphs.

5. In early September, prior the issuance of the RFSO, Sepha’s owner contacted PWGSC and requested that the solicitation include a requirement that all offerors have licences issued by either the CFIA or OMAFRA. He also contacted the CFIA asking it to confirm to PWGSC that, in order to supply frozen ready-to-eat meals of the type required by the CSC, a company must have such a licence.

6. On September 16, 2014, PWGSC’s supply officer responsible for the establishment of the standing offers informed Sepha, by e-mail, that the CFIA informed him that there was no requirement for bidders to have a CFIA or OMAFRA licence in order to supply Kosher meat. PWGSC also notified Sepha that it would be proceeding with the issuance of the RFSO, now that it had confirmation that such a licence was not required. That same day, in a subsequent e-mail to Sepha’s owner, PWGSC indicated that, in order to protect Canada’s rights to ensure compliance by its suppliers with any applicable laws in the performance of any contract resulting from an RFSO, PWGSC always included certain standard provisions as part of its contractual general terms and conditions.

7. Also on September 16, 2014, the solicitation was posted on MERX.³ The provisions of the RFSO, especially those setting out the mandatory technical criteria, do not include any requirement for bidders (i.e. “Offerors”) to demonstrate that they have a licence issued by the CFIA or OMAFRA.

8. Moreover, a review of Part 4 of the RFSO titled “**EVALUATION PROCEDURES AND BASIS OF SELECTION**” reveals that there is no requirement, as a condition precedent to the issuance of a standing offer, for the bidders to demonstrate that the food products that they propose would be produced in

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Canada’s electronic tendering service.

accordance with any applicable laws or regulations. Similarly, Part 5 of the RFSO titled “**CERTIFICATIONS**” did not require bidders to certify that they were in compliance with the relevant laws or regulations governing the production or sale of food products.⁴

9. On October 1, 2014, Sepha submitted a proposal in response to the solicitation. On October 31, 2014, PWGSC informed Sepha that it was not the winning bidder and that a standing offer had been issued to another bidder, Ernie & Ellie (9124-5464 Quebec Inc.).

10. On October 31, 2014, Sepha made a formal objection, in an e-mail to PWGSC, regarding the results of the evaluation of the proposals. Sepha alleged that the winning bidder was not in compliance with the laws of Canada, more specifically, that it was illegal for the winning bidder to ship food products to Ontario because it was not licensed by the CFIA or OMAFRA. Sepha also alleged that it was illegal for the CSC to purchase products from this company.

11. On November 3, 2014, in another e-mail to PWGSC, Sepha added that it did not understand why it was not awarded the contract, as the CFIA indicated in a letter to PWGSC that the company that would be awarded the contract had to be licensed by the CFIA or OMAFRA. On the same date, PWGSC replied that the standing offer was awarded to the offeror with the lowest evaluated bid and that Sepha’s bid was the highest of all bids received. PWGSC also indicated that, in view of the directions set out in Part 4 of the RFSO concerning the manner in which the bids would be evaluated, Sepha should not be surprised by the results of the evaluation process.

12. On November 4, 2014, PWGSC responded to the objection and confirmed, by way of letter, that a standing offer would not be issued to Sepha and re-iterated that the successful bidder was Ernie & Ellie (9124-5464 Quebec Inc.). PWGSC added that it conducted a full review of the evaluation of all offers and that, as a result of this exercise, it was determined that Sepha’s bid did not comply with all the mandatory requirements of the solicitation because it included an alteration to the pre-typed section of the pricing information form found in Annex “B” to the solicitation.⁵

13. On November 5, 2014, Sepha filed its complaint. The Tribunal determined that the complaint did not comply with subsection 30.11(2) of the *CITT Act*. Accordingly, on November 6, 2014, the Tribunal notified Sepha of the deficiencies to be corrected and requested that it provide additional information pursuant to subsection 30.12(2).

14. Sepha provided the requested additional information on November 6, 2014. Accordingly, the complaint was considered filed on November 6, 2014,⁶ within the time limits for the filing of a complaint set out in section 6 of the *Regulations*.

ANALYSIS

15. In order to conduct an inquiry into the complaint, paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable

4. The RFSO merely required offerors to certify that they were in compliance with certain “Integrity Provisions” and “Employment Equity” obligations. These provisions, which were incorporated by reference in the RFSO, concern matters other than the certification of compliance with any rules or standards concerning the production and sale of meat or food products.

5. Article 1.1.1 of the “**Mandatory Technical Criteria**” of Part 4 of the RFSO provides as follows: “Offers must not contain any alteration to the preprinted or pre-typed sections of the Basis of Payment form, or any condition or qualification placed upon the offer.”

6. Subrule 96(1) of the *Canadian International Trade Tribunal Rules* (S.O.R./91-499) provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the *CITT Act*, it will be considered filed “. . . on the day that the Tribunal receives the information that corrects the deficiencies”

indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,⁷ Chapter Five of the *Agreement on Internal Trade*,⁸ the *Agreement on Government Procurement*,⁹ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,¹⁰ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,¹¹ Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*,¹² Chapter Sixteen of the *Canada-Panama Free Trade Agreement*¹³ or Chapter Seventeen of the *Canada-Honduras Free Trade Agreement*¹⁴ applies. In this case, all these agreements apply.

16. In other words, the Tribunal must examine the complaint to determine whether there is a reasonable indication that the procuring entity conducted the procurement in a manner that was in violation of one of the applicable trade agreements.

17. Article 506(6) of the *AIT* provides as follows:

The 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.

18. Article 1015(4) of *NAFTA* provides as follows:

An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation

7. *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*].

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

9. *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> (entered into force 6 April 2014) [*AGP*].

10. *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). Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

11. *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).

12. *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).

13. *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).

14. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx>> (entered into force 1 October 2014).

19. Article XIII(4) of the *AGP* provides as follows:

4. (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. . . .

. . .

(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

20. The other trade agreements include similar provisions. Sepha alleged that the solicitation documents clearly stated that the offerors had to be in compliance with the laws of Canada and Ontario to be awarded a contract and that the winning bidder has not complied with those laws. In particular, Sepha claimed that the winning bidder is not licensed by either the CFIA or OMAFRA and is not authorized to ship food products across provincial borders (i.e. from Quebec to Ontario). In other words, Sepha's position is that the standing offer was wrongly awarded to a bidder that did not comply with the mandatory requirements of the solicitation.

21. Accordingly, the issue before the Tribunal is whether Sepha provided sufficient evidence for the Tribunal to conclude that there is a reasonable indication that PWGSC erred in its assessment of the information contained in the winning bidder's proposal and, as a result, breached the provisions of the applicable trade agreements in finding that the winning bidder and the products that it proposed complied with the mandatory technical criteria of the RFSO. For such a reasonable indication of a breach of the trade agreements to exist in this case, it must thus first be established that the compliance, by the offerors, with any applicable federal or provincial laws formed part of the criteria and essential requirements specified in the tender documentation.

22. As discussed above, the provisions of the RFSO do not include any requirement for bidders (i.e. "Offerors") to demonstrate that they had a licence issued by the CFIA or OMAFRA or that they were in compliance with any federal or provincial laws to be considered for the award of a standing offer. More specifically, the provisions of the RFSO that set out the essential requirements of the procurement and the criteria that would be used in the evaluation of bids simply do not refer to an obligation for bidders to demonstrate or certify *in their bids* that they are in compliance with any laws that would apply to the production and supply of the required food products.

23. Sepha's erroneous contention that this was a mandatory technical criterion set out in the solicitation documents or a requirement to be considered for the award of a contract appears to be grounded in certain standard clauses that are incorporated by reference in section B of Part 6 of the RFSO titled "**RESULTING CONTRACT CLAUSES**". These clauses, which are quoted in PWGSC's September 16, 2014, e-mail to Sepha, include the following general conditions:

2029 14 (2008-05-12) Compliance with Applicable Laws

The *Contractor* must comply with all laws applicable to the performance of the Contract. The *Contractor* must provide evidence of compliance with such laws to Canada at such times as Canada may reasonably request.

The *Contractor* must obtain and maintain at its own costs all permits, licences, regulatory approvals and certificates required to perform the Work. If requested by the Contracting Authority, the

Contractor must provide a copy of any required permit, licence, regulatory approvals or certificate to Canada.¹⁵

...

D3007C (2007-11-30) Inspection and Stamping

The *Contractor* must ensure that inspectors from the Canadian Food Inspection Agency (CFIA) have inspected all meat and meat products, poultry and poultry products, lard, shortening and margarine containing animal fats, and soups containing ingredients of animal origin, and have stamped those products “CFIA inspected for CG” before shipment.

The *Contractor* must arrange for all such products to be delivered to the consignee either from an establishment registered in accordance with the Meat Inspection Act, 1985, c. 25 (1st Supp.) and the regulations made under that Act, or from a food distributor that purchased the products from such an establishment. Canada will not accept products that have not been stamped by the CFIA.¹⁶

...

D5311C (2007-11-30) Rights of Access and Inspection of Meat

After final processing has been completed at a federally inspected plant, the *Contractor* must not alter, process or repack any meat that has been inspected and approved by the Canadian Food Inspection Agency.

Without limiting any of Canada’s rights of access or inspection included in the Contract, the Inspection Authority or its designated representative must have access to the storage and refrigeration areas on the *Contractor*’s premises at any time during the performance of the Contract in order to inspect the packaging and, if applicable, any processing of the meat. . . .¹⁷

[Emphasis added]

24. As they form part of the resulting contract clauses, these requirements apply to the resulting contract and not to the offers in response to the solicitation, i.e. they are not requirements to be fulfilled at bid closing. The RFSO clearly states that the aforementioned clauses and conditions “. . . apply to and form part of any contract resulting from a call-up against the Standing Offer.”¹⁸ Indeed, they are provisions that apply to the “Contractor” and not the “Offeror” during the procurement process, that is, at the bid solicitation stage. As such, compliance with these provisions is not required during the procurement process itself, but required only as part of the contract administration once the procurement process is completed.

25. In this regard, the Tribunal has consistently held that the resulting contract clauses set out in solicitation documents do not apply to the evaluation process and relate rather to contractual terms that will prevail once standing offers are issued.¹⁹ This entails that there is nothing in the requirements included in the resulting contract clauses that could prevent the winning bidder from being issued a standing offer.

15. <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2029/18>.

16. <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/D/D3007C/1>.

17. <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/5/D/D5311C/1>.

18. Section B of Part 6 of the RFSO.

19. *Davis Pontiac Buick GMC (Medicine Hat) Ltd. v. Department of Public Works and Government Services* (16 April 2008), PR-2007-070 (CITT) at para. 57; *Global Upholstery Co. Inc. v. Department of Public Works and Government services* (6 July 2009), PR-2008-052 (CITT) at para. 32; *Flag Connection Inc.* (9 January 2013), PR-2012-038 (CITT) at paras. 35-36; *Sunny Jaura o/a Jaura Enterprises* (21 February 2013), PR-2012-043 (CITT) at paras. 12-14.

26. Since they impose obligations on the “Contractor”, the resulting contract clauses relate to contract administration, an issue which is beyond the Tribunal’s jurisdiction. These clauses provide PWGSC with the authority to ensure that the “Contractor” supplies products that are produced and distributed in accordance with any relevant laws and regulations. Should the contractor fail to do so, PWGSC will have recourse against the contractor, which might include the cancellation of the contract. At that point in time, however, the procurement process, that is, the process within the Tribunal’s jurisdiction, which begins after an entity has decided on its procurement requirement and continues to the award of the contract,²⁰ is over.

27. Consequently, the Tribunal is of the view that there is nothing in the documents provided by Sepha to reasonably indicate that the decision to award the contract to its competitor was not in accordance with the criteria and essential requirements set out in the tender documentation. In other words, Sepha has not provided the Tribunal with a reasonable indication that the winning bidder was unable to propose products that were compliant with the mandatory technical criteria of the RFSO.

28. The Tribunal further notes that there is an onus on complainants to substantiate the allegations that they make. Where it is alleged that products proposed by a winning bidder in a procurement process fail to meet the essential requirements specified in the solicitation documents, the Tribunal will not conduct an inquiry unless there is some evidence indicating that the procuring entity could have erred in its assessment of the information contained in the proposals.²¹ In this case, Sepha merely alleged that the winning bidder was not in compliance with certain unspecified laws, without providing any substantiating evidence.

29. Therefore, even if the compliance with any laws or regulations governing the production and sale of food products (e.g. meat or frozen meals) had been included in the list of mandatory criteria and essential requirements specified in the tender documentation to be considered for the award of a contract,²² the information provided by Sepha would not have disclosed a reasonable indication that PWGSC breached the provisions of the applicable trade agreements in finding that the winning bidder or its products met these purported mandatory technical criteria. Similarly, even if this is a matter of contract administration that does not fall within its jurisdiction, the Tribunal notes that Sepha has not provided evidence that the winning bidder is not in compliance with all laws applicable to the performance of the contract.

30. In sum, there is no evidence that the evaluators did not properly apply themselves in evaluating the winning bidder’s proposal or otherwise erred in concluding that the products that it proposed complied in all respects with the mandatory technical criteria. To the contrary, PWGSC’s response to Sepha’s objection indicates that the decision to award a standing offer to Ernie & Ellie (9124-5464 Quebec Inc.) was made on the basis of a thorough review of the information that was before the evaluators at the time of the evaluation of the proposals.

31. As such, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

32. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

20. See, for example, Article 514(2) of the *AIT*, Article 1017(1)(a) of *NAFTA* and *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) [*Airsolid*] at paras. 13-16.

21. *Papp Plastics & Distribution Limited* (30 July 2007), PR-2007-028 (CITT); *Solartech Inc.* (16 October 2007), PR-2007-058 (CITT); *Airsolid*.

22. That is, had the aforementioned provisions formed part of the “**EVALUATION PROCEDURES AND BASIS OF SELECTION**” as opposed to being included in the “**RESULTING CONTRACT CLAUSES**”.

DECISION

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

Serge Fréchette

Serge Fréchette
Presiding Member