



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2015-004

Workplace Medical Corp.

v.

Canadian Food Inspection Agency

*Determination issued
Monday, July 27, 2015*

*Reasons issued
Tuesday, July 28, 2015*

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

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

BETWEEN

WORKPLACE MEDICAL CORP.

Complainant

AND

THE CANADIAN FOOD INSPECTION AGENCY

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid. Each party will bear its own costs.

Peter Burn
Peter Burn
Presiding Member

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

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STATEMENT OF REASONS

SUMMARY

1. On April 28, 2015, Workplace Medical Corp. (WMC) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a Request for Proposal (RFP) (Solicitation No. K0305) issued by the Canadian Food Inspection Agency (CFIA) for the provision of corporate occupational health services.
2. WMC alleged that the RFP contained unduly restrictive criteria and that its bid was improperly found non-compliant because the CFIA applied undisclosed or ambiguous criteria during the evaluation. WMC also alleged that improper discussions took place between representatives of the CFIA and the winning bidder during the procurement process, but this ground of complaint was withdrawn.²
3. As a remedy, WMC requested that the bids be re-evaluated. It also requested the disclosure of the evaluation of the winning bid in relation to the requirement in question.
4. For the reasons that follow, the Tribunal has determined that WMC's complaint is not valid.

BACKGROUND TO THE COMPLAINT

5. The CFIA issued the RFP and its accompanying annexes on January 26, 2015. A bidder's conference was held on February 18, 2015. The RFP was amended on March 2, 2015, to incorporate certain changes and answers to questions from potential bidders, including an amendment and answer relating to the provisions of the RFP that are relevant for this proceeding.
6. According to the Government Institution Report (GIR), at bid closing on March 6, 2015, the CFIA had received two bids in response to the solicitation, including WMC's bid.
7. On March 10, 2015, the technical portion of the two bids, which contained the information with respect to the mandatory technical criteria set out in the RFP, was submitted to the evaluation committee. The evaluation committee completed the technical evaluation process on March 23, 2015.
8. As a result of the evaluation, WMC's bid was found to be non-compliant with mandatory technical criterion M5, and it was set aside.
9. On April 1, 2015, the CFIA notified WMC that its bid was rejected because it was not compliant with mandatory criterion M5. On the same date, the contract was awarded to Workplace Health & Cost Solutions Ltd. (WHCS).
10. Following its objection on April 2, 2015, and a debriefing held on April 14, 2015, WMC filed a complaint with the Tribunal on April 28, 2015.

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

2. WMC withdrew this ground of complaint in its response to the Government Institution Report.

11. On 2015, 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

12. On May 25, 2015, the CFIA filed the GIR. On June 4, 2015, WMC filed its comments on the GIR.

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

RELEVANT PROVISIONS OF THE RFP

14. The RFP was issued by the CFIA for the provision of occupational health services to its employees across Canada on an “as and when requested basis” in the following five categories:

1. Health Evaluations [Periodic, Pre-Placement, Fitness to Work, Complex Health Evaluations, Advice and Consultation, File Reviews];
2. Immunizations;
3. Workplace Investigations (Noise Assessments, Indoor Air Quality, Industrial Hygiene Monitoring for a variety of workplace contaminants, Post Exposure Investigations, etc.)
4. Ergonomic Assessments (Office and Industrial); and
5. Emergency Situations – Emergencies to include Emergency Response to foreign animal disease or other emergency situation. This would include, but not limited to, medical advice, medical evaluations, immunizations, issuance of prescriptions and distribution of anti-viral medication.

15. The basis of the complaint primarily relates to the fifth category, “Emergency Situations”, and in particular to mandatory criterion M5, which reads as follows:⁴

M5.1 - The bidder must have provided occupational health-related services in **Emergency Situations** as detailed in section 1.0 of the Statement of Work (SOW) at Annex “A”

M5.2 For the purpose of this M5 criterion, it is also mandatory that these services provided by the Bidder have been provided to at least two (2) clients (either private or public entities) with a minimum number of 1500 employees in a minimum of two (2) different Geographic Areas

16. The term “emergency situations” is described in the SOW in the RFP as follows:⁵

3.0 OVERVIEW OF SERVICES

...

3.10 Emergency Situation

3.10.1 The CFIA requires 24 hours/7days accessibility to a physician for email/telephone consultation and deployment, as applicable, for the purpose of advice, guidance, on-site Health Evaluations for emergency personnel and/or administration of anti-viral medications, Health Evaluations, and/or immunizations and consultation during an emergency situation such as a Zoonotic outbreak (also referred to herein as an “Emergency Situation”).

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

4. Annex D to the RFP. See GIR, Exhibit 1.

5. Annex A to the RFP. See GIR, Exhibit 1.

17. The SOW also lists examples of the types of services required during an emergency situation:⁶

3.10.2 The services that may be requested during an Emergency Situation include, but are not limited to:

1. Advisory and Consultation Services with respect to communicable disease issues.
2. Health Assessments for candidates being hired to support operations requirements during a Zoonotic outbreak.
3. Group information sessions for the CFIA employees regarding the potential effects/symptoms of Zoonotic related exposure when contracted by humans and what steps to take should an employee develop those symptoms.
4. Prescription and administration of immunization/antiviral prophylaxis for employees assigned to work in Zoonotic contaminated areas.
5. Ongoing health surveillance/monitoring of employees identified as working in contaminated sites with follow up of employees who are reporting symptoms of Zoonotic-like illness.
6. Re-issue of antivirals to the CFIA employees working in contaminated sites as prescribed by the Public Health Agency of Canada (PHAC).
7. Workplace investigation services for the identification and evaluation of occupational hazards and provision of recommendations for control of these hazards.
8. Respiratory questionnaire review and assessment of employees if required.

18. The RFP was amended to include the following question and answer:

Q. Can a bidder submit an Emergency Situation not provided in the list under the Statement of Work 3.10.2?

The bidder can submit an Emergency Situation not included on the list provided it is for a *hands on* Emergency Situation. Training for these types of situations will not be accepted.

[Emphasis added]

WMC'S POSITION

19. WMC submitted that mandatory criterion M5 is unduly restrictive, as it requires experience of having provided occupational health-related services in emergency situations for at least two very large organizations in multiple regions. In its view, the services sought by the CFIA typically consist of providing physician support via e-mail and telephone, and the need for actual "hands on" experience in emergency situations is unnecessary, given that the CFIA has never before used such services in an emergency situation.

20. WMC alleged that the term "emergency situation"⁷ was applied inconsistently and erroneously by the CFIA. In particular, WMC claimed that it included its Cardiac Arrest Management Program in its bid response to criterion M5 because, at the bidder's conference, the CFIA confirmed that these services would meet the "emergency situation" requirement. At the debriefing, CFIA representatives told WMC that the types of services set out in its bid did not meet the "emergency situation" requirement and referred to the definition of "emergency" from a source that was not stated anywhere in the RFP.⁸

6. Annex A to the RFP. See GIR, Exhibit 1.

7. The complaint uses the term "emergency services" interchangeably with the term "emergency situation".

8. Complaint, attachment 10.

21. WMC submitted that the term “hands on” is ambiguous and should have been, but was not, defined in the solicitation documents. Nevertheless, it claimed its bid amply demonstrated that the proposed physicians had previously provided what it considers to be “hands on” occupational health services related to emergency situations (i.e. support and consultation) to the CFIA. In its response to the GIR, WMC stated that “hands on” services should reasonably include advice, support and debriefing services provided in the aftermath of an emergency event, such as a cardiac arrest, and that such services are not training.

CFIA’S POSITION

22. The CFIA submitted that WMC’s grounds of complaint with respect to any alleged ambiguity and restrictive character of mandatory criterion M5 and improper contact between representatives of the CFIA and the winning bidder during the procurement process should have been raised at the earliest opportunity and, as they were not, should be regarded as waived by WMC. This implies that the CFIA’s position is that these grounds of complaint are time-barred. In the alternative, the CFIA argued that all the grounds of complaint, including the alleged improper evaluation of WMC’s bid, are unfounded.

23. The CFIA submitted that mandatory criterion M5 is clear and unambiguous. In addition to requiring bidders to demonstrate that they have provided occupational health services to at least two clients in emergency situations, the solicitation documents included examples of the types of services that are deemed to comply with this requirement. The CFIA provided further clarification when, in response to a question from a potential bidder, it specified that acceptable examples of services must relate to a “hands on” emergency situation and not mere training for such situations. The CFIA also noted that the Crown has the right to set its own mandatory requirements as long as its operational requirements are met.

24. The CFIA argued that WMC failed to demonstrate that its bid complied with mandatory criterion M5 because it did not provide any valid examples of occupational health services performed during an emergency situation. Rather, WMC’s examples related to services provided before or after an emergency situation. On this basis, the evaluators determined that WMC’s bid was non-compliant with the mandatory requirements of the RFP and was therefore disqualified. While admitting that a CFIA representative referred to a definition that was not stated in the RFP at the debriefing, the CFIA submitted that this definition was not used in the evaluation of WMC’s bid, which was conducted strictly on the basis of the terms of the RFP and its accompanying documents and is, therefore, valid.

25. Finally, the CFIA denied the allegation of improper contact between its representatives and the winning bidder during the procurement process. According to the CFIA, its project manager and project administrator met with a WHCS representative after the bidder’s conference to discuss administrative and other issues related to a separate contract and they did not discuss the procurement process for this RFP.

ANALYSIS

26. Subsection 30.14(1) of the *CITT Act* requires that the Tribunal, in conducting an inquiry, limit its considerations to the subject matter of the complaint. Subsection 30.14(2) requires the Tribunal to determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract⁹ have been observed. The procedures and other requirements to be observed by the procuring entity are set out in the *Regulations*.

9. A “designated contract” is defined in section 30.1 of the *CITT Act* as “a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations.” Section 3(1) of the *Regulations* further provides that a “designated contract” is any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in the applicable trade agreements.

27. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in whichever of the *North American Free Trade Agreement*,¹⁰ the *Agreement on Internal Trade*,¹¹ the World Trade Organization *Agreement on Government Procurement*,¹² the *Canada-Chile Free Trade Agreement*,¹³ the *Canada-Peru Free Trade Agreement*,¹⁴ the *Canada-Colombia Free Trade Agreement*,¹⁵ the *Canada-Panama Free Trade Agreement*,¹⁶ the *Canada-Honduras Free Trade Agreement*¹⁷ or the *Canada-Korea Free Trade Agreement*¹⁸ applies.

28. In this case, the Tribunal is not satisfied that the services being procured, which relate to health services, are covered by any of the trade agreements. The Government of Canada's electronic tendering service indicated that the RFP was covered by the *AGP* and that the services are classified under Goods and Services Identification Number (GSIN) code G009G "Health and Welfare Services". Yet, health and social services are not covered by the *AGP* or any of the other trade agreements for that matter.¹⁹

29. If the services being procured are indeed excluded from the trade agreements, the complaint would not be in respect of a designated contract and, therefore, would be outside the Tribunal's jurisdiction.

30. The CFIA did not contest the complaint on the basis that it was not in respect of a designated contract. In the circumstances of a complaint dealing with health-related services, the Tribunal would have expected the CFIA to address the issue of coverage under the trade agreements and reminds counsel to be mindful of such jurisdictional matters.

10. *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].

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

12. *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].

13. *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.

14. *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).

15. *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).

16. *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).

17. *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).

18. *Free Trade Agreement between Canada and the Republic of Korea*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015).

19. All classes of services under GSIN code "G. Health and Social Services" are excluded by Annex 1001.1b-2 of *NAFTA*. Annex 5 of the *AGP* contains a positive list of services according to the United Nations Provisional Central Product Classification (CPC) system. CPC 993 applies to "[h]ealth and social services" and is not included in Annex 5, which means that these services are not covered by the *AGP*. Health services are an excluded category pursuant to the other trade agreements as well.

31. The Tribunal finds that, even if the complaint were found to be in respect of a designated contract covered by the *AGP*, none of the grounds of complaint are valid for the reasons that follow.

32. The standard of reasonableness applies to the Tribunal's consideration of the validity of a complaint.²⁰ To that end, the Tribunal will usually give wide deference to evaluators in their evaluation of proposals. The Tribunal will only substitute its judgment for that of the evaluators if it has been established that an evaluation is unreasonable. That situation can arise when 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 otherwise not conducted the evaluation in a procedurally fair way.

33. Furthermore, the Tribunal has also consistently held that bidders bear the onus of demonstrating how their bids meet the mandatory criteria published in the solicitation documents.²¹ Accordingly, the Tribunal has stated that it is incumbent upon bidders to exercise due diligence in the preparation of their bids to make sure that they are compliant with all mandatory requirements. In this respect, the Tribunal has refused to impose an obligation on government institutions to seek clarification from bidders. While bidders can and should ask questions to clarify mandatory requirements before bids are submitted, government institutions are not required to do likewise when bids are received.

34. In light of these principles, the Tribunal assessed whether the CFIA's evaluation of WMC's bid was reasonable and in accordance with the relevant provisions of the *AGP* and the RFP.

35. Article X(7) of the *AGP* provides that "[a] procuring entity shall make available to suppliers tender documentation that includes all information necessary to permit suppliers to prepare and submit responsive tenders" including "... a complete description of ... c. all evaluation criteria the entity will apply in the awarding of the contract."

36. Article XV(4) of the *AGP* provides that "[t]o be considered for an award, a tender shall ... comply with the essential requirements set out in the notices and tender documentation ..."

37. Similarly, subsection 2.1 of Part 4 of the RFP states that "[t]o be declared responsive, a bid must: (a) comply with all the requirements of the bid solicitation; and (b) meet all mandatory technical evaluation criteria (as specified in Annex "D") ..."

38. Subsection 3.1 further states that "[b]idders are encouraged to address all applicable criteria in sufficient depth in their proposals to permit a full evaluation of their proposals. The onus is on the Bidder to demonstrate that it meets the requirements specified in the solicitation."

39. The RFP is clear that mandatory criterion M5 requires the bidder to demonstrate that it has provided occupational health-related services in emergency situations to at least two clients with a minimum of 1,500 employees in a minimum of two different geographic areas.

20. *CAE Inc. v. Department of Public Works and Government Services* (26 August 2014), PR-2014-007 (CITT) [CAE] at paras. 30-31.

21. *CAE* at para. 32.

40. The Tribunal finds that there is no evidence to suggest that this particular requirement was unduly restrictive or onerous.²² In any event, this ground of complaint was filed outside the 10-working-day time frame prescribed in section 6 of the *Regulations* and, therefore, it is late. In the Tribunal's view, WMC knew or reasonably should have known the basis for its complaint that the requirement to demonstrate experience providing these services from two large organizations in different regions is overly restrictive when the RFP was issued on January 26, 2015. However, according to the complaint, WMC made an objection to the CFIA at the debriefing held on April 14, 2015, which was outside the 10-working-day time limit prescribed by subsection 6(2). In its response to the GIR, WMC claimed that it raised "these issues" at the bidders' conference on February 18, 2015. It is not clear if WMC raised the specific issue of the M5 requirement being overly restrictive at that time, but even if it did, this objection would not meet the prescribed time limit.

41. WMC argued that it was only at the debriefing that it realized that the evaluators had applied criteria that were undisclosed or inconsistent with WMC's understanding of the terms "emergency situation" and "hands on" in the solicitation documents. The Tribunal is prepared to give WMC the benefit of the doubt that it raised this ground of complaint at the earliest opportunity.

42. Nevertheless, as stated above, the Tribunal finds that the M5 criterion is clear. Although the term "hands on" is not expressly defined in the amendment to the RFP, when read together with the terms of the M5 criterion and the other relevant provisions of the RFP set out above, it plainly required the bidder to provide examples where it had, in fact, previously provided occupational health-related services in emergency situations. The capability to provide such services would not, in itself, be sufficient to meet the M5 criterion.

43. The Tribunal is satisfied, on the basis of the evaluation committee's consolidated notes and the notes of the individual evaluators, that the evaluation was solely based on the terms of the solicitation documents and did not involve the application of undisclosed criteria.²³

44. The Tribunal carefully reviewed WMC's response to the M5 criterion and the related evaluators' comments, which were filed with the GIR. In its bid, WMC stated in response to the M5 criterion that it has provided emergency situations support to three clients.²⁴ The Tribunal finds that two of the three examples provided clearly did not meet the requirement for "hands on" services provided in an "emergency situation". WMC expressly stated in its response that one of the three clients had yet to experience any emergency events. For another client, WMC's response to M5 provides no description of services provided in emergency situations and refers to its response to M1 for more information; however, the latter does not mention emergency situations. Therefore, even if the third example were acceptable, it would be insufficient to meet the requirement that WMC *demonstrate* that it has *provided* occupational health-related services to *at least two clients* in emergency situations.

45. In light of the above, the Tribunal finds that WMC has not established that the CFIA's evaluation of WMC's was unreasonable and therefore the Tribunal has no basis to interfere in the evaluation. This ground of complaint is not valid.

22. The Tribunal has previously held that a government institution is entitled to define and meet its reasonable and legitimate operational requirements, as long as the procurement is not structured to favour any particular potential supplier. See *Agri-SX Inc.* (27 March 2013), PR-2012-051 (CITT) at paras. 26-29; *723186 Alberta Ltd.* (12 September 2011), PR-2011-028 (CITT) at paras. 19-21.

23. GIR (protected), tabs 4, 5.

24. GIR (protected), tab 5.

46. Finally, even though the allegation regarding improper contact between CFIA representatives and the winning bidder was withdrawn, the Tribunal considers it important to state that there was no evidence in the complaint that the CFIA's conduct during the procurement process raised a reasonable apprehension of bias. The Tribunal finds that the CFIA provided a plausible explanation for the meeting that took place after the bidder's conference on February 18, 2015, between representatives of the CFIA and the eventual awardee, the purpose of which was to discuss another contract and not the procurement in question. In the Tribunal's view, the fact that such a conversation took place does not, in itself, raise a reasonable apprehension of bias, and there was no evidence or rationale provided by WMC as to how it would do so. Allegations of bias must be raised as early as possible and any results would have certainly been known at the time of the award of the contract on April 1, 2015, making this ground of complaint time-barred by section 6 of the *Regulations* even if it had not been withdrawn.

47. In view of the foregoing, the Tribunal finds that the complaint is not valid.

COSTS

48. The CFIA requested costs in relation to this inquiry.

49. The Tribunal has decided not to award costs in this particular case. As stated above, the CFIA did not address the issue of whether the services being procured are covered under the *AGP*, which the Tribunal considers would have likely resulted in a more expeditious proceeding. As a result, the Tribunal finds that the CFIA is not entitled to costs.

DETERMINATION OF THE TRIBUNAL

50. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. Each party will bear its own costs.

Peter Burn
Peter Burn
Presiding Member