



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-044

Wheel Systems International, Inc.

*Decision made
Tuesday, December 15, 2015*

*Decision issued
Tuesday, December 15, 2015*

*Reasons issued
Monday, January 4, 2016*

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

WHEEL SYSTEMS INTERNATIONAL, INC.

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. This complaint relates to a Request for Proposal (RFP) for run flat insertion/removal machines (Solicitation No. W8476-155291/A) issued by the Department of Public Works and Government Services (PWGSC)³ on behalf of the Department of National Defence. In essence, Wheel Systems International, Inc. (WSI) alleged that PWGSC improperly evaluated its bid. As a remedy, WSI requested that it be awarded the designated contract.

3. The complaint was filed within the time frame provisions of subsection 6(1) of the *Regulations*. However, for the reasons detailed below, the complaint does not disclose a reasonable indication of a breach of the trade agreements listed at paragraph 7(1)(c); consequently, the Tribunal cannot conduct an inquiry into this complaint.

BACKGROUND

4. PWGSC issued the solicitation on September 1, 2015. The solicitation period concluded on October 13, 2015.

5. On November 19, 2015, PWGSC informed WSI that its proposal was non-compliant (1) because its bid did not meet the mandatory requirement that the product “. . . be in service with NATO” and (2) because no response was given to the mandatory requirement that the product “. . . comply with Products Containing Mercury Regulations.” It would appear from the complaint that WSI was also previously informed (on November 6, 2015) that its complete bid was never received by PWGSC.

6. On November 19, 2015, WSI wrote PWGSC to contest the decision to reject its proposal.

7. Thereafter, pursuant to section 1.4 of the RFP, the parties began scheduling a debriefing. Such debriefing never took place. PWGSC decided, instead, to respond to WSI in writing on November 24, 2015.

8. On December 8, 2015, WSI filed its complaint with the Tribunal.

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

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

3. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services will be changed to Public Services and Procurement Canada.

ANALYSIS

Complaint

9. In accordance with the trade agreements, the Tribunal evaluates whether bidders properly comply with solicitation requirements and whether evaluations made by a government institution are properly conducted, applying the standard of reasonableness.

10. In its complaint, WSI admits that it did not properly answer either of the two mandatory requirements for which its bid was rejected.⁴

11. In respect of the mandatory requirement that the product “. . . be in service with NATO”, WSI recognizes that it did not provide the correct NATO Stock Number (NSN), qualifying it as an “inadvertent error”, but argues that PWGSC had the obligation to allow it to clarify its bid before rejecting it. The Tribunal notes that WSI’s answer to that requirement consisted in giving nothing more than an NSN (one that was not even for the proper product) and that it did not provide narrative details either, contrary to bid instructions. The Tribunal finds that PWGSC properly evaluated WSI’s response to that criterion. Listing the wrong NSN number was, on its own, sufficient grounds to find WSI’s bid non-compliant in respect of that mandatory criterion and, therefore, to reject its bid.

12. The Tribunal notes that the solicitation documents clearly indicate that PWGSC has the “. . . *right* to ask for additional information to *verify* the Bidder’s certifications” [emphasis added], but that it is under no *obligation* to do so. Also, the right for PWGSC to ask for clarifications, if exercised, can never be an opportunity for a bidder to supplement information that is missing in its bid—that would be impermissible bid repair. In this instance, because WSI would have had to repair a mistake, there was no possible opportunity for mere clarification of anything that was contained within the “four corners” of the bid that WSI had submitted.

13. In respect of the mandatory requirement that the product “. . . comply with Products Containing Mercury Regulations”, WSI again admits that it “. . . forgot to . . . fill in [that] box . . .” in its bid, but again argues that PWGSC had the obligation to allow it to clarify (or, in effect, repair that omission) its bid before rejecting it. For the same reasons given above, the Tribunal finds that WSI’s bid was simply non-responsive to a second mandatory criterion and that PWGSC properly identified this other ground for bid rejection.

14. More fundamentally, PWGSC appears to have given WSI the benefit of feedback on an incomplete bid. Arguably, incomplete bids need not be evaluated at all because incompleteness, on its own, is grounds for outright rejection.

15. A bidder is responsible to ensure that it submits a complete bid to the appropriate bid receiving unit before bid closing time. The documents filed in this complaint unequivocally demonstrated that WSI did not discharge that responsibility. Instead, WSI sent its bid via a fax number other than the one that was specified in the solicitation documents. The machine with the erroneous fax number was located in an office inside PWGSC, but outside of PWGSC’s bid receiving unit, where bids were supposed to be directed as stated in the solicitation documents. An employee of PWGSC noticed bid documents at that erroneous fax machine and kindly brought them to PWGSC’s bid receiving unit. It turns out that the PWGSC employee noticed that there were only the first 74 pages of WSI’s proposal. When the PWGSC employee noticed the remainder of WSI’s proposal, the employee similarly brought it to the bid receiving unit; however, by that

4. Procurement Complaint Form at 8.

time, the bid closing deadline had passed. As such, WSI did not submit a complete bid in a timely manner, and PWGSC had grounds to reject WSI's bid on that basis alone.

16. The integrity of the procurement system depends on the timely receipt of complete bids in the manner and at the place specified in solicitation documents. Tribunal case law has confirmed this without exception even in circumstances of unfortunate life events or human or technical mishaps.⁵

17. Furthermore, the integrity of the procurement system is predicated, in large part, upon suppliers' knowledge that they can count on a system where the same rules apply to all, that their bids will be received and evaluated in a transparent and fair manner, and that arbitrariness and preferential treatment are afforded to no one. Compliance with mandatory requirements cannot be waived even in circumstances where buyers would be immediately better off financially; fundamentally, suppliers are encouraged to bid because, win or lose, they know that they will be treated fairly and equitably. As explained above, this is why bid repair is never permissible.

18. In conclusion, the complaint does not disclose a reasonable indication of a breach of the trade agreements. The Tribunal considers this matter closed.

Additional Comments on Section 1.4 of the RFP—Debriefing Session

19. Although not a ground of complaint raised by WSI, in reviewing this matter, the Tribunal ascertained an element of the RFP that requires the following important comments for systemic reasons.

20. The Tribunal notes that section 1.4 of the RFP requires bidders to request a debriefing “. . . within *fifteen (15) working days* from receipt of the results of the bid solicitation process” [emphasis added].

21. Of crucial importance, and in stark contrast to section 1.4 of the RFP, subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than *10 working days* after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier” [emphasis added].

22. It follows that, while a bidder may not discover its ground(s) of complaint until a debriefing has taken place, it is also true that a bidder *may* discover ground(s) of complaint as soon as it receives the results of the procurement process (i.e. prior to the debriefing). In the latter situation, if a bidder decides to abide by section 1.4 of the RFP and request a debriefing within the 15-working-day time frame (or wait until a debriefing takes place more than 10 days after discovering its ground(s) of complaint), there is a strong likelihood that a complainant will become time-barred from accessing redress from the Tribunal by reason of subsection 6(1) of the *Regulations*.

23. WSI's complaint appears not to have been impacted in this instance. However, the Tribunal is nonetheless concerned that section 1.4 of the RFP, as drafted, will cause confusion for potential complainants, if similarly used in other solicitations. In short, the Tribunal is of the view that section 1.4 of

5. *Promaxis Systems Inc.* (11 January 2006), PR-2005-045 (CITT) (difficulty with fax transmission); *GHK Group* (4 September 2007), PR-2007-031 (CITT) (delivery of bid to the then Canadian International Development Agency [CIDA]), the technical authority, instead of to PWGSC, that was conducting the procurement on CIDA's behalf); *Corbel Management Corp.* (25 May 2009), PR-2009-009 (CITT) (car accident delayed delivery of bid); *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT) (delivery of bid after bid closing time); *Headwall Photonics, Inc.* (25 September 2012), PR-2012-017 (CITT) (no evidence of delay of bid receipt attributable to PWGSC's shipping/receiving department).

the RFP is, at worst, misleading, or, at best, creates very real potential for causing bidders to be time-barred from the statutory procurement review mechanism. The Tribunal invites PWGSC to review this clause.

DECISION

24. 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