



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-056

Azimuth Consulting Group
Partnership

*Decision made
Monday, February 1, 2016*

*Decision and reasons issued
Friday, February 5, 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

AZIMUTH CONSULTING GROUP PARTNERSHIP

AGAINST

THE DEPARTMENT OF FISHERIES AND OCEANS

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.

Peter Burn

Peter Burn
Presiding Member

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.

RELEVANT FACTS

2. On September 24, 2015, the Department of Fisheries and Oceans (DFO) issued a Request for Proposals (RFP) (Solicitation No. F5211-150227) regarding the provision of environmental risk management services.

3. The RFP indicated that it was the intention of the DFO to issue five standing offers, with a total value of \$4 million.

4. On November 22, 2015, Azimuth Consulting Group Partnership (Azimuth) submitted a proposal in response to the RFP. The tendering period of the RFP ended on November 30, 2015.

5. On January 5, 2016, the DFO informed Azimuth that it had not been awarded a standing offer since its bid, which failed to include a signed offer of services agreement, was non-responsive. In addition, the DFO indicated that standing offers had been awarded to five other bidders.

6. On January 7, 2016, Azimuth objected in writing to the DFO, asserting that the requirement to include a signed offer of services agreement was ambiguous, in that it was not clearly stipulated within the RFP.

7. On January 11, 2016, the DFO responded in writing to the objection by referring Azimuth to a number of provisions within the RFP.

8. On January 12, 2016, Azimuth replied in writing, requesting that the DFO provide it with information on how it could appeal the DFO's decision.

9. On January 18, 2016, the DFO responded to Azimuth by way of a telephone call, indicating that subsequent to a managerial review, its conclusion regarding the non-responsiveness of Azimuth's bid remained unchanged. The DFO also directed Azimuth to the Tribunal with regard to any intended appeal of its decision. Subsequently, on the same day, the DFO wrote to Azimuth, reiterating its position, as well as the option available to Azimuth with regard to an appeal.

10. On January 29, 2016, Azimuth filed this complaint with the Tribunal. Azimuth alleges that, contrary to Articles 1010, 1013 and 1015 of the *North American Free Trade Agreement*,³ as well as

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

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

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, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

Article 506(6) of the *Agreement on Internal Trade*,⁴ the required format and content of bids was not clearly set out within the RFP.⁵ Specifically, Azimuth takes the position that the RFP did not include a signed offer of services agreement as an essential or mandatory requirement of bids.

ANALYSIS

11. Pursuant to sections 6 and 7 of the *Regulations*, upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether a number of conditions have been met before an inquiry can be conducted. The relevant condition in the present circumstance is whether the information provided by Azimuth discloses a reasonable indication that the procurement was not conducted in accordance with the trade agreements.

12. The Tribunal notes that the RFP, as issued by the DFO, comprised multiple documents, including the following: a letter of invitation; an offer of services agreement; instructions to tenderers; general conditions; terms of payment; a statement of work; evaluation criteria; stipulations regarding the Federal Contractors Program for Employment Equity; insurance conditions; stipulations regarding intellectual property; and certifications.

13. Azimuth has taken the position that neither the instructions to tenderers nor the evaluation criteria contain an indication that a submitted bid include a signed offer of services agreement. Azimuth asserts that an offer of services agreement, if included in tender documents, is typically included with the understanding that it need not be signed during the tendering period.

14. In this case, the multiple documents employed within the tendering process required bidders to understand and respond to dispersed essential requirements.⁶ The totality of essential requirements was not limited to the terms of the evaluation criteria document, as that document appears to have been limited to the technical and financial considerations of the tendering process only.

15. As to the essential requirement to submit a signed offer of services agreement, the Tribunal finds clauses 3, 8 and 19 of the agreement to be particularly relevant.

16. Clause 3, “**DOCUMENTS**”, of the offer of services agreement provides as follows:

The Contractor hereby undertakes to perform and complete the work . . . set out in accordance with the following documents which, upon acceptance of the Offer of Services, will form part of the standing offer:

1. This Offer of Services duly completed and signed;

...

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [AIT].

5. Article 1010 of *NAFTA* effectively requires that the RFP contain, among other things, a “. . . statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers”. Article 1013 of *NAFTA* requires that the RFP contain “. . . all information necessary to permit suppliers to submit responsive tenders . . .”. Article 1015 of *NAFTA* stipulates that contract awards are to be made, among other things, “. . . in accordance with the criteria and essential requirements specified in the tender documentation . . .”. Article 506(6) of the *AIT* stipulates that “. . . 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 weighing and evaluating criteria.”

6. Thus, for example, the instructions to tenderers document contains a stipulation that the requirements in the included Federal Contractors Program for Employment Equity document must be met by a certain type of bidder.

17. Clause 8, “**SUBMISSION**”, of the offer of services agreement provides as follows:

The Contractor submits herewith the following:

- a) Offer of services duly completed and signed (1 electronic copy);
- b) Technical Proposal (1 electronic copy);
- c) Financial Proposal (1 electronic copy);
- d) Certifications (1 electronic copy).

18. Clause 19, “**SIGNATURE FOR OFFER OF SERVICES**”, of the offer of services agreement requires the signature of the contractor or other persons legally authorized to bind the applicable legal person.

19. Further, the Tribunal notes that subclause 11.1 of the “**INSTRUCTIONS TO TENDERERS**” indicates that “[i]ncomplete or conditional tenders will be rejected.”

20. The stipulation regarding the submission of a signed offer of services agreement formed an essential requirement of the RFP, despite the fact that it was contained within that agreement itself. In keeping with well-established jurisprudence, in the event of any perceived ambiguity, the onus was on Azimuth to seek and gain clarification from the DFO during the tendering period.⁷ Indeed, the Tribunal notes that at least five other bidders were able to understand the requirements and respond accordingly.

21. Thus, Azimuth has not submitted any evidence that would lead the Tribunal to the *prima facie* conclusion that the RFP, contrary to the terms of *NAFTA*, did not contain all information necessary to permit suppliers to submit responsive tenders or, contrary to the terms of the *AIT*, did not identify the requirements of the procurement, the criteria to be used in evaluating the bids, and the weight assigned to that criteria. The DFO properly allocated the weight assigned to the submission of a signed offer of services agreement by adjudging a bid without it incomplete and thus non-responsive.

22. In light of the foregoing, there is no reasonable indication of a breach of the trade agreements, and the Tribunal will not conduct an inquiry into the complaint.

DECISION

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

Peter Burn
Peter Burn
Presiding Member

7. *Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT); *Info-Electronics H P Systems Inc. v. Department of Public Works and Government Services* (2 August 2006), PR-2006-012 (CITT).