



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-068

Renown Industries Ltd.

*Decision made
Monday, March 21, 2016*

*Decision and reasons issued
Thursday, March 24, 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

RENOWN INDUSTRIES 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.

Rose Ritcey _____
Rose Ritcey
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.

SUMMARY OF THE COMPLAINT

2. The complaint relates to a solicitation for eight reciprocating pumps (Solicitation No. W8482-168270/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence. Renown Industries Ltd. (Renown) alleged that PWGSC improperly evaluated its proposal.

3. The Request for Proposals (RFP) was issued on December 16, 2015, with a bid closing date of January 26, 2016. Renown submitted a bid prior to the bid closing date.

4. The contract was awarded to ADI Process Solutions Ltd. on February 16, 2016, and a notice of contract award was posted on www.buyandsell.gc.ca on February 17, 2016.³

5. On March 3, 2016, Renown contacted PWGSC because it had seen the notice of contract award on the website but had not received notice of or a reason for the rejection of its bid.

6. On the same day, PWGSC sent Renown a letter of rejection by email. In the letter, PWGSC indicated that Renown's bid, which offered substitute pumps to the existing models, had not met the following mandatory criterion of the RFP:

3.1.1 Equivalent Products

...

2. Products offered as equivalent in form, fit, function and quality will not be considered if:

...

(b) the substitute product fails to meet or exceed the mandatory performance criteria specified in the bid solicitation for that item.

7. Renown requested further explanation as to how their equivalent product did not meet the standards with regard to fit, function and quality. PWGSC responded that "the footprint (where [the pump] connects to the deck)" of the equivalent pumps, as well as the inlet/outlet points, did not match those of the models that were being replaced. As a result, the ships on which the pumps would be installed would need to be reconfigured, and additional spare parts would need to be procured.

8. On March 7, 2016, Renown replied and acknowledged that "the footprint is not exactly the same", but suggested that it would only take minor modifications to install the pumps it had proposed. Specifically,

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

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

3. Notice of contract award: <https://buyandsell.gc.ca/procurement-data/award-notice/PW-HP-530-68649-001>.

Renown stated that since the pump should not be installed with rigid piping, the fact that the inlet and outlet points were not exact should not be an issue if the pumps were installed correctly. According to Renown, stocking spare parts would not be a problem. Finally, Renown stated that if PWGSC had communicated these concerns during the bidding process, it would have provided information on mounting options.

9. On March 17, 2016, Renown filed its complaint with the Tribunal.

10. As a remedy, Renown requested that the bids be re-evaluated, that the designated contract be terminated, and that the designated contract be awarded to the complainant.

ANALYSIS

11. On March 21, 2016, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into this complaint. The reasons for that decision are as follows.

12. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry if the following four conditions are met:

- the complaint has been filed within the time limits prescribed by section 6;⁴
- the complainant is an actual or potential supplier;⁵
- the complaint is in respect of a designated contract;⁶ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁷

13. While the first three of these criteria are met, Renown's complaint does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements, which, in this case, are the *Agreement on Internal Trade*⁸ and the *North American Free Trade Agreement*.⁹

14. The applicable trade agreements require that a procuring entity provide potential suppliers with all the information necessary to permit them to submit responsive tenders, including the criteria which will be used for evaluating and, further, awarding the contract. For instance, Article 1013(1) of *NAFTA* provides as follows: "Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders . . . The documentation shall also include: . . . (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . ."

4. Subsection 6(1) of the *Regulations*.

5. Paragraph 7(1)(a) of the *Regulations*.

6. Paragraph 7(1)(b) of the *Regulations*.

7. Paragraph 7(1)(c) of the *Regulations*.

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

9. *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].

15. The trade agreements also stipulate that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation and require that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation. For instance, Articles 1015(4)(a) and (d) of *NAFTA* provide 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 . . . (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”

16. It is well established in Tribunal jurisprudence that it is the bidder’s responsibility to ensure that its proposal is compliant with all essential elements of a solicitation.¹⁰ For its part, the government institution must ensure that the bid under evaluation thoroughly and strictly complies with the mandatory requirements identified in the tender documents.¹¹

17. In conducting procurement inquiries, the Tribunal will not substitute its judgment for that of the evaluators unless the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have unreasonably 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.¹²

18. The RFP at issue clearly indicated that bids must comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive. Further, in order to be recommended for award of a contract, a responsive bid must have the lowest evaluated price on an aggregate basis.¹³

19. As cited above, the RFP further stated that equivalent products would not be considered if they failed to meet or exceed the mandatory performance criteria set out in the solicitation.

20. The mandatory performance criteria are found in Part 1 of the RFP. One of the criteria is that the pumps must measure 20.8” (height) by 15.1” (width) by 12.2” (depth).¹⁴ According to the specifications provided as part of its technical bid, the corresponding dimensions of the pumps proposed by Renown are not the same.¹⁵

21. Further, Renown’s claim regarding the minor modifications that could be made to the pumps in order to ensure that they fit the existing ship configuration was not provided as part of its bid.

10. *Unisource Technology Inc.* (13 December 2013), PR-2013-027 (CITT) at para. 16; *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

11. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA).

12. *Excel Human Resources Inc. (operating as excellTR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 30; *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT) at para. 51; *Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT) at para. 10.

13. RFP, Part 4, Articles 4.1 and 4.2.

14. RFP, Part 1 – Line Item Detail at 3.

15. *Ingersoll Rand Company Ltd.: Sales & Engineering Data, PD15X-XXX-XXX and PE15X-XXX-XXX 1-1/2" Metallic Diaphragm Pump*, submitted as part of Renown’s bid. Neither PWGSC nor Renown explained what they meant by “footprint”. However, the Tribunal considers that, in this context, “footprint” refers to some or all of the physical dimensions specified in the mandatory performance criteria. (See, for example, *Merriam-Webster’s Collegiate Dictionary*, 11th ed., s.v. “footprint”: “2 a : the area on a surface covered by something”).

22. Finally, the onus was not on PWGSC to request additional information from Renown on mounting options that would allow its substitute pumps to meet the mandatory performance criteria. Rather, Renown should have posed questions to PWGSC while the solicitation was still open.

23. In light of these facts, the Tribunal finds that the information provided by the complainant does not disclose a reasonable indication that the procurement was not conducted in accordance with the trade agreements.

DECISION

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

Rose Ritcey

Rose Ritcey

Presiding Member