



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-038

Keller Equipment Supply Ltd.

*Decision made
Thursday, October 20, 2016*

*Decision issued
Tuesday, October 25, 2016*

*Reasons issued
Wednesday, November 2, 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

KELLER EQUIPMENT SUPPLY LTD.

AGAINST

DEFENCE CONSTRUCTION CANADA

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.

Ann Penner
Ann Penner
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.

SUMMARY OF COMPLAINT

2. On October 18, 2016, Keller Equipment Supply Ltd. (Keller) filed a complaint regarding a Notice of Proposed Procurement (NPP) by Defence Construction Canada (DCC) for the supply of portable engine exhaust units and the construction of a new electrical distribution system to power such units in a building located at Canadian Forces Base Suffield, Alberta (Project No. SD152907_CN64029).

3. Keller complained that DCC unfairly refused to accept and review its bid because it was received after the bid submission deadline. Keller argued that DCC should have made an exception and accepted its bid. Keller explained that its bid was late because it was confused by the terms of the NPP about (1) whether a bid could be submitted electronically and (2) the time by which bids had to be received on the date of bid closing.³

4. As a remedy, Keller requested that its bid be accepted and reviewed by DCC.

BACKGROUND

5. DCC issued the NPP on September 19, 2016, with a bid closing date and time of 4:00 p.m. EDT on October 12, 2016.

6. The NPP stated that bids would be received at a physical address in Medicine Hat, Alberta. The NPP also noted that an “. . . Authorized Signer PIN . . . generated by MERX . . .”⁴ was required to submit bids electronically.⁵

7. Keller explained that it requested an authorized signer PIN from MERX on October 12, 2016. However, as MERX would not accept its electronic bid, Keller contacted Mr. Randy Archer of DCC to request more information. Mr. Archer explained that, as per the instructions in the NPP, bids had to be submitted in person at the address specified in the NPP.

8. Accordingly, Keller had a courier deliver its bid. The courier arrived at 4:14 p.m. EDT. DCC returned the bid to the courier, as it was received 14 minutes after the bid closing time.

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

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

3. Complaint at 1-2.

4. Complaint at 4.

5. MERX is a private electronic tendering service that posts tenders for the Canadian public sector, Crown and private corporations, and the U.S. federal, state and local marketplace.

ANALYSIS

9. To initiate an inquiry, the Tribunal must find that (a) the complainant is a potential supplier, (b) the complaint is in respect of a designated contract and (c) the complaint discloses a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.⁶ The complaint must also be filed within the prescribed time limits.⁷

10. Keller's complaint is timely,⁸ and involves a potential supplier⁹ and a designated contract.¹⁰ However, Keller's complaint does not disclose a reasonable indication that the procurement was conducted in breach of any applicable trade agreement, in this case the *AIT*.

11. In particular, Keller's complaint does not indicate a breach of Article 506(4) of the *AIT*, which requires that a procuring entity clearly indicate to potential suppliers the date, time and place for the delivery of bids.

12. As noted above, Keller said that it was confused by two of the provisions of the NPP, that is, (1) whether a bid could be submitted electronically and (2) the time by which bids had to be received on the date of bid closing.

13. In regard to the manner by which bids were to be submitted, Keller argued that its bid would have been submitted on time had it been delivered electronically, through MERX, as provided by the terms of the NPP. In particular, Keller pointed to the language in the NPP indicating that ". . . an Authorized Signer PIN number generated by MERX is required in order to submit your bid electronically" and that "[t]his PIN must be requested by the person with the authority to bind your organization."¹¹

14. Notwithstanding this language in the NPP, the Tribunal finds that Keller ignored that the NPP expressly required a physical bid submission, as indicated under the heading "Bid Submission Type". It also identified a mailing address in Alberta as the location at which "[s]ealed tenders will be received"

15. Moreover, section 7 of DCC's "Standard Construction Contract Documents", incorporated by reference into the NPP,¹² clearly indicated that tenders had to be enclosed in an envelope and submitted to the office designated for the receipt of tenders and that tenders that were not received on time would not be considered. Section 7 provides as follows:

6. Subsection 7(1) of the *Regulations*.

7. Section 6 of the *Regulations*.

8. Keller filed its complaint with the Tribunal on October 18, 2016, which is four working days after the bid closing date of October 12, 2016, when DCC determined that Keller's submission was late and refused Keller's subsequent request for an exception. Thus, the complaint meets the time limits prescribed by subsection 6(2) of the *Regulations*.

9. Keller, having attempted to submit a bid in response to the NPP, meets the definition of "potential supplier" under section 30.1 of the *CITT Act* as ". . . a bidder or prospective bidder on a designated contract."

10. The NPP published on MERX identifies the *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*], as applicable to the procurement and identifies the issuing organization as DCC, which is a covered Canadian Crown corporation, and the contract value as \$311,000, which is above the applicable monetary thresholds.

11. Complaint at 4.

12. http://www.dcc-cdc.gc.ca/documents/forms/DCL250_Standard_Construction_Contract_Documents.pdf.

7 SUBMISSION OF TENDER

- 7.1 The tender, duly signed and completed, *is to be enclosed in an envelope, and addressed and submitted to the office designated for the receipt of tenders.*
- 7.2 The Tenderer is to ensure the tender is clearly identified by including the following information on the face of the tender envelope:
- 7.2.1 solicitation or project number;
 - 7.2.2 name of the Tenderer;
 - 7.2.3 closing date and time; and
 - 7.2.4 closing location.
- 7.3 *Tenderers intending to have their tender hand delivered to the Tender Closing Office are advised to allow sufficient time for their carrier to clear building security.*
- 7.4 *Tenders must be received at the Tender Closing Office stipulated on the Tender Form, on or before the specified tender closing date and time, as determined by the Tender Closing Office clock. TENDERS RECEIVED AFTER THIS DATE AND TIME SHALL NOT BE CONSIDERED, REGARDLESS OF ANY REASON FOR THEIR LATE ARRIVAL.*

[Emphasis added]

16. Finally, the NPP did *not* indicate that DCC would accept electronic submissions,¹³ as confirmed when Keller contacted Mr. Archer for more information on the morning of October 12, 2016, prior to the bid closing time.

17. Therefore, while the reference to electronic submissions in the NPP and the MERX-generated authorized signer PIN could have been potentially unclear, a full reading of the NPP was sufficiently clear to avoid any such confusion. Further, when Keller registered with MERX to become an authorized signer for e-bid submissions (on the morning of the bid closing date), it received a confirmation e-mail from MERX which stated that the PIN was to be used at the time of submission “[w]hen a buyer indicates that they will receive bids electronically through MERX . . .” [emphasis added]. As there was no such requirement in the NPP, DCC’s refusal to permit electronic bidding was consistent with, and even expressly required by, the terms of the NPP.

18. Keller complained that it was confused by the time by which bids had to be submitted. It explained that it “over looked” the reference to 4:00 p.m. EDT in the NPP and assumed that bids were to be received by 4:00 p.m. local time in Medicine Hat, Alberta.

19. The NPP included a closing date of October 12, 2016, and a closing time of “04:00:00 PM EDT” [emphasis added]. The NPP also indicated that bids had to be received by “. . . 14:00 hours, local time” (i.e. Mountain Daylight Time (MDT), given the job location and bid submission address).

13. Additionally, Keller’s complaint includes an e-mail from MERX providing instructions on how to submit an electronic bid. The third sentence of that e-mail states as follows: “When a buyer indicates that they will receive bids electronically through MERX, you will be required to use your PIN at the time of submission” [emphasis added]. It then provides a list of steps for submitting an electronic bid, including first finding a tender under the heading “E-bid Submissions”. There is no allegation or evidence that the NPP was ever included under this heading as an e-bid submission, nor is there any evidence on the face of the NPP of the *buyer* (DCC) indicating it would accept electronic submissions—in the applicable subheading, the only method designated is “Physical Bid Submission”.

20. 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.¹⁴

21. The NPP is clear that bids received after the closing deadline "...SHALL NOT BE CONSIDERED, REGARDLESS OF ANY REASON FOR THEIR LATE ARRIVAL." The Tribunal has previously found that permitting one bidder to benefit from an extension to the bid closing deadline can be unfair to other bidders, so much so that they could file their own complaint with the Tribunal.¹⁵ DCC therefore had no discretion to allow Keller to submit its bid late, in violation of the explicit terms of the NPP and, potentially, the *AIT*. While it could have used consistent terminology throughout the NPP when referring to the closing time, there was no actual discrepancy in the closing time stated in the NPP. Any confusion on Keller's part appears to have stemmed from a misreading of the NPP.

22. In light of the above, the complaint does not disclose a reasonable indication of a breach of the *AIT*.

DECISION

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

Ann Penner

Ann Penner

Presiding Member

14. *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, which was conducting the procurement on CIDA's behalf); *Corbel Management Corp.* (25 May 2009), PR-2009-009 (CITT) (car accident delayed delivery of bid) [*Corbel*]; *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT) (delivery of bid after bid closing time); *PA Consulting Group* (20 September 2011), PR-2011-03 (CITT) (delivery of bid to recipient of services' address rather than PWGSC); *Headwall Photonics, Inc.* (25 September 2012), PR-2012-017 (CITT) (no evidence of delay of bid receipt attributable to PWGSC's shipping/receiving department); *Falcon Environmental Services Inc. v. Department of Public Works and Government Services* (13 May 2015), PR-2014-061 (CITT) (delivery of bid to recipient of services' address rather than PWGSC); *Wheel Systems International, Inc.* (15 December 2015), PR-2015-044 (CITT) (delivery of bid to wrong fax number).

15. *Corbel* at para. 18.