



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2016-012

Otec Solutions Inc.

v.

Department of Foreign Affairs,
Trade and Development

*Determination and reasons issued
Wednesday, October 5, 2016*

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IN THE MATTER OF a complaint filed by Otec Solutions Inc. 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

OTEC SOLUTIONS INC.

Complainant

AND

**THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND
DEVELOPMENT**

**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.

Jason W. Downey

Jason W. Downey
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: August 29, 2016

Tribunal Member: Jason W. Downey, Presiding Member

Counsel for the Tribunal: Rebecca Marshall-Pritchard

Student-at-law: Amélie Cournoyer

Registrar Officer: Bianca Zamor

Registrar Support Officer: Rachel Cunningham

Complainant: Otec Solutions Inc.

Representative of the Complainant: Jim Jezioranski

Government Institution: Department of Foreign Affairs, Trade and Development

Counsel for the Government Institution: Julie Greenspoon

WITNESS:

Kerry Roney
Manager, Domestic Procurement Operations (AAC)
Department of Foreign Affairs, Trade and
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STATEMENT OF REASONS

SUMMARY

1. On May 30, 2016, Otec Solutions Inc. (Otec) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under section 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Proposal (RFP) (Solicitation No. 16-116914) issued by the Department of Foreign Affairs, Trade and Development (DFATD)² for the provision of an “Online Real-time Tailoring Digital Asset Management Brand Extranet”.
2. Otec alleged that DFATD improperly concluded that its bid did not meet the conditions set out in the RFP and wrongfully rejected its bid.
3. As a remedy, Otec requested that it be awarded its bid preparation and complaint preparation costs.
4. For the reasons that follow, the Tribunal finds that Otec’s complaint is not valid.

BACKGROUND OF THE COMPLAINT

5. On April 13, 2016, DFATD issued the RFP, with a closing date of May 24, 2016.
6. Otec sent its bid on that day to the following address: emilie.hamelin-boileau@international.gc.ca.
7. On May 25, 2016, Ms. Emilie Hamelin-Boileau of DFATD informed Otec via e-mail that its bid would not be considered because it did not comply with the instructions on the submission of bids.³
8. On that same day, Otec objected to DFATD by e-mail.⁴
9. On May 30, 2016, Otec was contacted via e-mail by Ms. Hamelin-Boileau’s supervisor, Ms. Kerry Roney, Manager, Domestic Procurement Operations (AAC), DFATD, who confirmed that Otec’s bid would not be considered because it had been sent to the incorrect e-mail address.⁵
10. On May 30, 2016, Otec filed the complaint with the Tribunal.
11. On June 2, 2016, the Tribunal requested that Otec clarify the precise e-mail address to which it sent its bid. Otec provided the necessary information on the same day.⁶
12. On June 7, 2016, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.13(2) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁷

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

2. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Foreign Affairs, Trade and Development would be changed to Global Affairs Canada.

3. Exhibit PR-2016-012-07 at 143, Vol. 1.

4. *Ibid.* at 145.

5. *Ibid.* at 147.

6. Exhibit PR-2016-012-01C at 69, Vol. 1.

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

13. On June 30, 2016, DFATD filed its Government Institution Report (GIR) with regard to the complaint.

14. On August 2, 2016, the Tribunal informed the parties that it would hold a public hearing on August 29, 2016, in accordance with subrule 105(6) of the *Canadian International Trade Tribunal Rules*⁸ in order to hear testimony from Ms. Hamelin-Boileau and any necessary oral arguments from the parties regarding the manner of reception of the bids in this procurement process. However, on August 4, 2016, DFATD informed the Tribunal that Ms. Hamelin-Boileau would not be available to testify at the hearing and proposed instead that Ms. Roney testify as a witness for DFATD at the hearing. On August 9, 2016, the Tribunal accepted the proposed alternate witness.

15. On August 17, 2016, the Tribunal held a pre-hearing teleconference pursuant to subrule 18(1) of the *Rules* to discuss the logistics and parameters of the hearing scheduled for August 29, 2016.

16. The hearing was held in Ottawa, Ontario, on August, 29, 2016. The Tribunal heard evidence from Ms. Roney. Mr. Jim Jezioranski, President and Representative of Otec, participated in the hearing via teleconference from Toronto, Ontario.

RELEVANT PROVISIONS OF THE RFP

17. The first page of the RFP, in the top left-hand corner, states as follows:

RETURN BIDS TO:

...

itservices.aaci@international.gc.ca

Attention: Emilie Hamelin Boileau – AAC

18. The first page of the RFP also indicated another e-mail address, in the top right-hand boxed area, only a few centimeters away from the e-mail address above, which reads as follows:

Address Inquiries to: . . .

emilie.hamelin-boileau@international.gc.ca

19. Section 2 of Part 2 of the RFP, titled “**BIDDER INSTRUCTIONS**”, provides as follows:

2. Submission of Bids

Bids must be submitted only to Department of Foreign Affairs, Trade and Development by the date, time and email address indicated on page 1 of the bid solicitation. Bids must NOT be sent directly to the Contracting Authority. Bids sent directly to the Contracting Authority will not be considered.

The non-compliance with stated requirements will be grounds for rejection and the proposal will not be considered.

20. Section 5.1 of Part 2 of the RFP sets out the bidder’s responsibilities and provides as follows:

It is the Bidder’s responsibility to:

...

b. prepare its proposal in accordance with the instructions contained in the RFP

8. S.O.R./91-499 [Rules].

21. Similarly, section 4.2 of Part 4 of the RFP provides that, “[t]o be declared responsive, a bid must: (a) comply with all the requirements of the bid solicitation; and (b) meet all the mandatory technical evaluation criteria”

POSITIONS OF PARTIES

Otec

22. On numerous occasions throughout these proceedings, Otec readily acknowledged that it had sent its bid to the incorrect e-mail address. However, it submitted that, because the bid was supposed to be sent to the generic e-mail address, that is, itservices.aaci@international.gc.ca with attention to Ms. Hamelin-Boileau, its bid should not have been rejected even though it was sent to a different e-mail address, emilie.hamelin-boileau@international.gc.ca, since Ms. Hamelin-Boileau would receive the bid regardless of which of the two e-mail addresses was used. Otec argued that it should not be disqualified from the process due to such a minor clerical error and that its bid should be considered.

DFATD

23. DFATD argued that bidders must comply strictly with the instructions of a solicitation that provide for the time and place for the bids to be submitted. It submitted that the cover page of the RFP clearly stipulated all the key information required for the solicitation, including where to submit the bids and where to address inquiries.⁹ Moreover, DFATD argued that the “Submission of Bids” section in the RFP clearly indicated that bids were to be submitted only to DFATD at the e-mail address indicated on page 1 of the RFP.¹⁰

TRIBUNAL ANALYSIS

24. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

25. The trade agreements 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.

26. For instance, Articles 1015(4)(a) and (d) of *North American Free Trade Agreement*¹¹ 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

9. Exhibit PR-2016-012-07 at para. 1, Vol. 1.

10. *Ibid.* at para. 16.

11. *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: Global Affairs Canada <<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).

specified in the tender documentation . . .” Article 506(6) of the *Agreement on International Trade*¹² provides as follows: “The 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 weighting and evaluating the criteria” [emphasis added].

27. When considering the manner in which bids are evaluated, the Tribunal applies the standard of reasonableness. The Tribunal has consistently held that it will not substitute its judgment for that of the evaluators unless there is evidence that 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.¹³

28. Furthermore, it is well established in Tribunal jurisprudence that, when responding to a solicitation, the onus is on the bidder to demonstrate that it meets all the mandatory requirements of the procurement,¹⁴ including the requirement to submit a bid to the correct address.¹⁵

29. In other words, it was incumbent upon Otec to exercise due diligence in the preparation and delivery of its bid and to make sure that it was compliant with all mandatory requirements. In this case, bids were to be sent to itservices.aaci@international.gc.ca. However, as admitted by Mr. Jeziorianski on several occasions,¹⁶ Otec erroneously sent its bid to emilie.hamelin-boileau@international.gc.ca.

30. As previously mentioned, the RFP indicated that bids must be submitted only to the e-mail address mentioned on the first page of the RFP in order to be compliant. In cases of conformance with essential criteria, the Tribunal has previously found that the test is one of strict compliance. Failure to meet a mandatory requirement is not a “mere” or minor irregularity.¹⁷

31. While DFATD acknowledges that Ms. Hamelin-Boileau, DFTAD’s procurement officer assigned to the solicitation process, did in fact receive Otec’s bid in her personal e-mailbox, the Tribunal finds that the RFP clearly stated the e-mail address to which bids were to be sent, which was a “positional”/generic e-mail address.

12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>>.

13. *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 24, citing *Nothern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at para. 52; *CAE Inc. v. Department of Public Works and Government Services* (26 August 2014), PR-2014-007 (CITT) at para. 31.

14. *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).

15. *PA Consulting Group* (20 September 2011), PR-2011-030 (CITT); *GHK Group* (4 September 2007), PR-2007-031 (CITT); *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT).

16. Otec’s supplemental submissions, Exhibit PR-2016-012-01C at 69, Vol. 1, provide as follows: “We fully understand and admit that we mistakenly sent it to the wrong e-mail in our haste to get the bid in on time.” *Transcript of Pre-hearing Teleconference*, 17 August 2016, at 11; *Transcript of Public Hearing*, 29 August 2016, at 40.

17. *Neopost Canada Limited v. Canada Revenue Agency* (29 December 2015), PR-2015-033 (CITT) at para. 23.

32. In her testimony, Ms. Roney explained to the Tribunal the rationale for requiring the bids to be sent to a positional/generic e-mail address, which is the standard practice¹⁸ at the Department of Public Works and Government Services.¹⁹ Essentially, positional/generic e-mail addresses are specifically used for the submissions of bids in order to protect bidders. Since these mailboxes are accessible by several procurement officers, their use ensures that bids which have been submitted can be accessed by other team members in the event that a procurement officer responsible for a solicitation process is not in the office or not able to move a given procurement process along. It also ensures that bids not “get lost” among all the other e-mails that a procurement officer receives in her personal e-mailbox.²⁰

33. Further, in cross-examination, Mr. Jezioranski asked Ms. Roney to explain why the inquiries related to the RFP were properly submitted to the personal e-mail address of the procurement officer assigned to the case and why the bid itself had to be submitted to the generic/positional e-mail address. She testified that, unlike bids, although it is important to get the questions answered, questions are not official documents.²¹ In closing argument, Mr. Jezioranski suggested that, in order to avoid confusion, both inquiries related to an RFP and bids should be directed to the same e-mail address.

34. The Tribunal acknowledges that the multiplicity of e-mail addresses and their relative proximity on the first page of the RFP could be potentially confusing to bidders, especially, as in this case, when one of those e-mail addresses was Ms. Hamelin-Boileau’s address, while the other generic/positional e-mail address indicated that bids were to be sent to the attention of Ms. Hamelin-Boileau.

35. Notwithstanding the merits of having such a positional/generic e-mail as espoused by Ms. Roney, the use of the “attention to” and the fact that the same name appears twice in relation to two different e-mail addresses give rise to a certain degree of uncertainty and confusion. As such, DFATD may wish to consider the merits of modifying the way in which the information is presented on the cover page of its RFPs in the future or of directing inquiries to the same e-mail address to which the bids are to be submitted.

36. However, given the specific instructions stated in the RFP with respect to the submission of bids and given the clear recognition from the bidder that it used the wrong address, the Tribunal finds that there is no indication that DFATD erred in rejecting Otec’s proposal.

37. The Tribunal has consistently made it clear in the past that the standard for adherence to the trade agreements is a strict one. The Tribunal therefore finds that Otec failed to establish that it met the mandatory requirements of the solicitation.

38. Accordingly, the Tribunal finds that the evidence does not disclose a reasonable indication that there was a breach of the applicable trade agreements and, therefore, that the complaint is not valid.

18. *Transcript of Public Hearing*, 29 August 2016, at 13-14.

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

20. *Transcript of Public Hearing*, 29 August 2016, at 15-20.

21. *Ibid.* at 21-22.

DETERMINATION OF THE TRIBUNAL

39. 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.

Jason W. Downey

Jason W. Downey

Presiding Member