



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-040

R2Sonic, LLC

*Decision made
Thursday, October 27, 2016*

*Decision issued
Monday, October 31, 2016*

*Reasons issued
Wednesday, November 9, 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

R2SONIC, LLC

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.

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 THE COMPLAINT

2. On October 25, 2016, R2Sonic, LLC (R2Sonic) filed a complaint regarding a Request for Proposal (RFP) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO) for the provision of a multi-beam bathymetric sonar system (Solicitation No. FP845-160047/A).

3. R2Sonic complained that two of the mandatory technical requirements of the RFP—mandatory criteria (MC) 2.1j and 2.1k³—were unclear and in violation of Article 1013 of the *North American Free Trade Agreement*.⁴ As such, it argued that its bid was unfairly deemed non-responsive. R2Sonic also complained that PWGSC unreasonably refused its offer to amend the bid so that it would be compliant with the RFP. In R2Sonic's view, amending the bid in such a manner would not have unfairly disadvantaged other bidders and would have been of overall benefit to the end user, that is, the Canadian Hydrographic Service (CHS) of DFO and the Crown.

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. Those criteria provide as follows:

ANNEX C TECHNICAL EVALUATION CRITERIA

PART 1: MANDATORY CRITERIA

...

Item	Minimum Mandatory Requirements	Pass /Fail	Bid Ref Page #	Comments
...
2.	Technical Description			
2.1	System Features			
...
j	The system must include all software necessary for navigation and acquisition of data.
k	The system must be compatible with Hysweep and QINSy data logging software.			
...

4. *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) [*NAFTA*].

4. As a remedy, R2Sonic requested that the contract be terminated and that the bids be re-evaluated or that a new solicitation be issued.

BACKGROUND

5. On September 1, 2016, PWGSC issued the RFP with a closing date of September 21, 2016. R2Sonic submitted a bid prior to the closing date.

6. On October 11, 2016, PWGSC contacted R2Sonic to request that it identify where, in its bid, information regarding the navigation and data acquisition software required by MC 2.1j could be found and to confirm that the software was included in its pricing.

7. On October 12, R2Sonic replied that it had provided the software “. . . necessary to enable Hysweep and QINSy to log data”⁵ but that it interpreted MC 2.1k as meaning that CHS would provide Hysweep or QINSy software. R2Sonic also requested permission to amend its bid to include Hysweep software in order to “. . . [complete] the requirement at 2.1j.”⁶

8. On October 21, 2016, PWGSC informed R2Sonic that its proposal had been determined non-responsive to MC 2.1j and that, as a result, its bid had been disqualified. In response to R2Sonic’s October 12, 2016, e-mail, PWGSC stated that, “[w]hile the documentation makes mention of compatibility with Hypack [Hysweep] and QINSy software packages, it does not specifically indicate that a version of this software will be provided.”⁷

9. On October 21, 2016, the contract was awarded to Seahorse Geomatics, Incorporated.

10. On October 24, 2016, R2Sonic contacted PWGSC by telephone to object to the disqualification of its bid. R2Sonic explained that it had interpreted MC 2.1j and 2.1k to mean that it was not necessary to provide data logging software but only necessary to ensure that all other software provided was compatible with Hysweep and QINSy. R2Sonic requested that PWGSC accept its offer to amend its bid on the basis that the criteria were unclear.

11. According to R2Sonic, PWGSC stated that the specifications were sufficiently clear and that PWGSC could not accept R2Sonic’s offer to amend its bid because the contract had already been awarded.

12. On October 25, 2016, R2Sonic submitted its complaint to the Tribunal.

13. On October 27, 2016, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into this complaint.

ANALYSIS

14. 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 6,⁸

5. Complaint, Attachment 1 at 3.

6. *Ibid.* at 3.

7. *Ibid.* at 6.

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

- the complainant is an actual or potential supplier;⁹
- the complaint is in respect of a designated contract;¹⁰ and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.¹¹

15. In this case, the fourth condition is not met. R2Sonic's complaint does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements.¹²

16. According to MC 2.1j, the RFP required that potential suppliers provide "... *all software necessary* for navigation and acquisition of data" [emphasis added] as part of their proposed systems. Furthermore, MC 2.1k stated that any software provided had to be compatible with Hysweep and QINSy data logging software.

17. The Tribunal finds that the meaning of MC 2.1j and 2.1k is clear and that it does not support the interpretation adopted by R2Sonic (i.e. that it was not necessary to provide navigation and data acquisition software but only necessary to ensure that all other software provided was compatible with Hysweep and QINSy). MC 2.1j plainly states that potential suppliers must provide navigation and data acquisition software. The fact that the navigation and data acquisition software proposed by the potential suppliers was also required to be compatible with existing navigation and data acquisition software does not alter this requirement.

18. R2Sonic acknowledged that it did not seek clarification of the meaning of MC 2.1j because it believed that its interpretation of what was required was correct. However, the Tribunal finds that R2Sonic's interpretation was based on a significant and erroneous assumption, namely, that CHS would provide the required software. R2Sonic's assumption is contradicted by the requirement in MC 2.1j and is not supported by any other provision of the RFP. Unfortunately, R2Sonic relied on this assumption to its detriment.

19. The Tribunal has consistently held that bidders are fully responsible for demonstrating compliance with all mandatory requirements of an RFP.¹³ Likewise, the Tribunal has held that government entities may choose to seek clarifications about the contents of a bid before it is evaluated. Those clarifications must strictly refer or relate to a better understanding of the contents of a bid; they cannot take into account new information intended to form a substantive part of a bid. Prohibiting bidders from supplementing their

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

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

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

12. According to the complaint, R2Sonic is based in Austin, Texas, and did not provide the Tribunal with a Canadian business address. Accordingly, the applicable trade agreements in this case are those that provide rights to potential suppliers based in the United States, i.e. *NAFTA* and the *World Trade Organization Agreement on Government Procurement, Revised Agreement on Government Procurement*, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> (entered into force 6 April 2014). The Tribunal further finds that these agreements are applicable despite the fact that the solicitation documents indicate that this procurement is subject only to 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/>>.

13. *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).

proposals after bid closing ensures that all bidders are given a fair and equal opportunity in the bid evaluation process.¹⁴

20. In accordance with these principles, the Tribunal finds that PWGSC rightly chose to seek clarification from R2Sonic with respect to the location of any information regarding navigation and data acquisition software in its bid. It also rightly refused R2Sonic's offer to amend its bid to include the missing software after the bid closing date. Contrary to R2Sonic's assertions, had PWGSC accepted new information, it would have unfairly disadvantaged other bidders that submitted complete proposals at the time of bid closing.

21. By R2Sonic's own admission, its bid did not fully respond to MC 2.1j when it was submitted. Further, the software listed in R2Sonic's bid in response to MC 2.1j was either the basic operating system for the laptop included in the system or was characterized as software for the "control and operation" of its system.¹⁵ None of it was described as software for navigation or for the acquisition of data.

22. Therefore, the Tribunal finds that PWGSC had no choice but to disqualify R2Sonic's bid on the basis that it was non-responsive to the mandatory requirements of the RFP. As such, R2Sonic's complaint does not disclose a reasonable indication that PWGSC failed to conduct the procurement in accordance with the applicable trade agreements.

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. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 127.

15. Complaint, Attachment 3 at 42-43.