



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-049

StenoTran Services Inc.

*Decision made
Monday, January 23, 2017*

*Decision issued
Monday, January 23, 2017*

*Reasons issued
Friday, January 27, 2017*

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

STENOTRAN SERVICES INC.

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

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 January 17, 2017, StenoTran Services Inc. (StenoTran) filed a complaint with the Tribunal regarding a Request for Standing Offer (RFSO) (Solicitation No. EN578-171290/A) issued by the Department of Public Works and Government Services Canada (PWGSC) for transcription services.

3. StenoTran complained that PWGSC improperly declared its proposal non-responsive on a rated criterion evaluating the quality of its sample transcripts on the grounds that StenoTran had failed to include in its proposal the source audio digital recordings on which the transcripts were based.

4. As a remedy, StenoTran requested that the Tribunal order PWGSC to permit it to submit a supplementary filing of its recordings (now well past the bid closing date) or, alternatively, that PWGSC review its sample transcripts against the rated criterion on their substance, that is, without automatically according zero points due to the absence of the recordings.³

BACKGROUND

5. PWGSC issued the RFSO on November 25, 2016, with a closing date of December 20, 2016. The RFSO provided that the bidders' technical proposals would be evaluated first against three mandatory criteria and then, if they passed all of those, on four rated criteria.⁴ Each of the rated criteria contained a minimum passing score of 14 out of a maximum of 20 points, i.e. 70 percent.⁵

6. On December 29, 2016, PWGSC e-mailed StenoTran asking where in its proposal it had included the source audio digital recordings for the sample transcripts to be provided in response to rated criterion 3.⁶ StenoTran asserted that it thought it had included the recordings but, when presented with a screenshot of the index of the CD it had submitted showing only one PDF file, asked for another opportunity to submit the recordings.⁷

7. On December 30, 2016, PWGSC informed StenoTran that it could not accept any supplementary filings, because the recordings would constitute new information rather than mere clarification of an existing aspect of the proposal and would, thus, be a type of impermissible bid repair under article 5.30(c) of

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Exhibit PR-2016-049-01, complaint at 6-7.
4. *Ibid.*, RFSO, article 4.1.1.1.
5. *Ibid.*, RFSO, article 4.1.1.2.
6. *Ibid.*, e-mail correspondence at 150.
7. *Ibid.* at 146-149.

PWGSC's Supply Manual.⁸ PWGSC further informed StenoTran that, because of the missing recordings, PWGSC would not be able to evaluate rated criterion 3 and would, therefore, automatically give StenoTran a score of 0 out of 20 points on this criterion, rendering StenoTran's proposal non-responsive.⁹

8. StenoTran e-mailed an objection¹⁰ the same day, arguing that rated criterion 3 only provided that recordings "should" (not "must" or "shall") be provided, and asking PWGSC to evaluate the transcripts against the criteria PWGSC would have used if it had received the recordings, namely, the clear identification of speakers and the number of spelling and punctuation errors and inaudible segments.¹¹

9. On January 4, 2017, PWGSC denied StenoTran's objection and request for re-evaluation.¹²

10. On January 17, 2017, StenoTran filed its complaint with the Tribunal.

ANALYSIS

11. To initiate an inquiry, the Tribunal must be satisfied 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,¹³ which in this procurement is the *Agreement on Internal Trade*.¹⁴ The complaint must also be filed within the prescribed time limits.¹⁵

12. The Tribunal finds that StenoTran's complaint meets conditions (a) and (b) and is timely, but that it does not disclose a reasonable indication that the procurement was conducted in breach of the applicable trade agreements and, therefore, fails to meet condition (c).

13. Article 506(6) of the *AIT* requires that "[t]he 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."¹⁶ In cases where the application of Article 506(6) of the *AIT* is at issue, the Tribunal does not generally 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

8. *Ibid.*, e-mail correspondence at 145.

9. *Ibid.*

10. In its complaint form, StenoTran indicated (at page 4) that it had not made an objection. However, it is clear from the e-mail correspondence provided with the complaint that StenoTran had objected to PWGSC.

11. *Ibid.*, e-mail correspondence at 144.

12. *Ibid.* at 143.

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

14. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*]. StenoTran grounds its complaint on Article 1009(2)(b) of the *North American Free Trade Agreement* [*NAFTA*], but this reliance is misplaced. First, Article 1009 involves qualification of suppliers not evaluation of proposals, the focus of StenoTran's complaint. Second, transcription services are excluded from coverage by Canada under Annex 1001.1b-2 of *NAFTA*. Third, the RFSO provides, in article 1.2.3, that it is subject to the *AIT*. It is a designated contract thereunder as it involves a requirement for the supply of transcription services by PWGSC. The RFSO does not indicate an estimated monetary value or estimated volume of service expected, but as it does contemplate individual call-ups of up to \$400,000 over a one-year term that may be extended up to three additional years, it, at least *prima facie*, meets the \$100,000 threshold for services under the *AIT*. RFSO, article 8.3. Also, at page 7 of its complaint, StenoTran refers to the RFSO as "encompassing nearly the entire federal government".

15. Section 6 of the *Regulations*.

16. Article 506(6) of the *AIT*.

proposal, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.¹⁷ In addition, the Tribunal is of the view that the responsibility for ensuring that a proposal is compliant with all of the essential criteria of a solicitation ultimately resides with the bidder.¹⁸

14. The offer preparation instructions in article 3.1 of Part 3 of the RFSO provide that “[i]n their technical offer, Offerors should explain and demonstrate how they propose to meet the requirements and how they will carry out the Work.”¹⁹

15. The instructions for responding to the rated criteria provide as follows:²⁰

4.1.1.2 Point Rated Technical Criteria

Only offers that meet all of the Mandatory requirements will be considered in the evaluation of the Rated Requirements. To be considered responsive, an offer must obtain a minimum score of 70% for each of the point rated criteria.

16. The entirety of rated criterion 3 provides as follows:²¹

R.3 QUALITY OF TRANSCRIPTS (20 points / 7 points minimum per transcript)

For stream 1 and/ or stream 2 (as applicable), the Offeror should demonstrate their ability to provide high quality transcripts in English and in French *by providing* a sample English transcript and a sample French transcript *along with the source audio or video on CD or DVD*. The length of the digital recording for each transcript *must be* between a minimum of three (3) minutes to a maximum of five (5) minutes.

[Emphasis added]

17. Rated criterion 3 also included the following sample evaluation grid for English transcripts, which provides as follows:²²

Criteria a) sample English transcript	Criterion is not met 0%	Criterion is partially met 50%	Criterion is fully met 100%
Transcript Format (maximum 4 points)	- speakers are often identified incorrectly, or not at all; - it is difficult to determine when one speaker stops and another begins.	-speakers are usually identified, and properly; - new speakers are identified.	-all speakers and relevant titles/positions are properly identified. - new speakers are always clearly identified.
Conventions and accuracy (maximum 6 points)	- the transcripts include many spelling errors (in excess of 8 in any one transcript); - serious and frequent	- the transcripts made few spelling errors (no more than 4 in any one transcript); - few errors in	- the transcripts have no more than 2 spelling errors in any one transcript.; - no more than 2 errors in

17. *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CITT) at para. 26.

18. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT).

19. Exhibit PR-2016-049-01C, RFSO, Part III, article 3.1, Vol. 1.

20. *Ibid.*, RFSO, Part IV, article 4.1.1.2.

21. *Ibid.*, RFSO, Part IV, article 4.1.1.2, R.3.

22. *Ibid.*, RFSO, Part IV, article 4.1.1.2, R.3. The grid for French transcripts is identical.

	errors in punctuation (in excess of 8 in any one transcript); -the number of inaudible segments renders the transcript unintelligible.	punctuation (no more than 4 in any one transcript); - there are few inaudible segments, and the flow of the transcript is not affected.	punctuation in any one transcript; - there are no inaudible segments.
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...

18. StenoTran submitted that the use of the word “should” instead of “must” leads to the conclusion that the submission of digital recordings in response to rated criterion 3 was optional. In support of its assertion, it observed that elsewhere in the RFSO, PWGSC uses the term “must” to express necessity and “should” to express advice or suggestion.

19. The Tribunal finds that, when read in context rather than in isolation, the use of “should” in rated criterion 3 is neither ambiguous nor does it express mere advice or suggestion. The RFSO contained three mandatory requirements and four rated criteria. For the mandatory requirements, the RFSO uses the term “must” as follows:²³

- the offeror “must demonstrate that they have at least three (3) years’ experience . . . within the last five (5) years . . .” (M1);
- the offeror “must provide a minimum of two (2) transcriptionists” meeting various requirements (M2); and
- the offeror “must provide a minimum of two (2) projects each” meeting various requirements (M3).

20. For the four rated criteria, the RFSO uses the term “should” as follows:²⁴

- the offeror “should describe the organizational approach and methodology that will be used in completing all aspects of the Statement of Work.” (R.1);
- the offeror “should include details on when the work [submitted in M3] was performed, a brief description of the work performed, turnaround times and for whom the services were provided. Offerors should identify the Project Manager (or main contact for departments) and their relevant experience related to this requirement.” (R.2);
- the offeror “should demonstrate their ability to provide high quality transcripts in English and in French by providing a sample English transcript and a sample French transcript along with the source audio or video on CD or DVD. The length of the digital recording for each transcript must be between a minimum of three (3) minutes to a maximum of five (5) minutes.” (R.3); and
- the offeror “should provide full details of their quality control and backup plans to ensure delivery of quality transcripts within the turnaround times as identified in the statement of work.” (R.4).

23. *Ibid.*, RFSO, Part IV, article 4.1.1.1.

24. *Ibid.*, RFSO, Part IV, article 4.1.1.2.

21. While “should” is a modal verb that can indicate, depending on the circumstances, *inter alia*, that doing something is obligatory or advisable, in this context, the word can only be reasonably interpreted in its obligatory sense. All of the rated criteria use the term “should”—thus, were StenoTran’s interpretation to be adopted, it would lead to the absurd result that all of the instructions in the rated criteria were merely advisory. This would make it permissible for an offeror to provide no response at all to the rated criteria, thus making it impossible to score proposals other than as a fail or to consistently score and rank proposals with responses to the rated criteria against those without responses.

22. Indeed, there is no evidence that StenoTran or anyone else found to be ambiguous or confusing the use of the word “should” in the rated criteria instead of “must” in the mandatory criteria or elsewhere in the RFSO. In both its correspondence with PWGSC and its submissions to the Tribunal, StenoTran maintained that the omission of the recordings was accidental and that it had thought it had included them.²⁵

23. StenoTran submitted that its bid should be scored even without the recordings, but doing so would be contrary to the wording of rated criterion 3, which explicitly contemplates that the evaluation team will be assessing the quality of transcripts by comparing them to recordings. Rated criterion 3 instructs that an offeror “should demonstrate their ability to provide high quality transcripts in English and in French by *providing* a sample English transcript and a sample French transcript *along with the source audio or video on CD or DVD*” [emphasis added].

24. Scoring StenoTran’s response without reference to a recording would also be unfair to other offerors, whose transcripts will have been reviewed (and potentially deemed wanting) in this fashion. StenoTran argued that PWGSC can identify the number of spelling and punctuation errors and inaudible segments by reference to the transcripts alone, but that unduly narrows the scope of the evaluation under rated criterion 3 to merely verifying the internal consistency and polish of the transcripts. Rated criterion 3 provides that offerors “should demonstrate their ability to provide high quality transcripts” by providing both a transcript and the source audio or video. The criterion, thus, clearly contemplates that the recordings will be used to determine whether the transcripts accord with the events in the recordings. By listening to the recordings, the evaluation team can determine whether the transcripts accurately reflect the actual words of the events transcribed. The recordings may contain audible clarification of the correct spelling of proper names, organizations, etc. Further, it will only be through the recordings, for example, that the evaluators will be able to verify whether, as the evaluation grid assesses, speakers are identified correctly or at all with their relevant titles, new speakers are identified, and when one speaker stops and another begins.

25. StenoTran also argued that because rated criterion 3 did not specify whether offerors should submit “intelligent verbatim” transcripts (which are slightly edited for readability) or “true verbatim” transcripts (which contain every sound on the recording including laughter, pauses, false starts, etc.), the entire exercise of comparing transcripts to recordings is unjustified. This objection fails as well. First, because the alleged error appears on the face of the RFSO, it is untimely because it should have been brought within 10 working days of the publication of the RFSO on November 25, 2016, consistent with the deadlines set by the *Regulations*. Second, the distinctions StenoTran raised between intelligent and true verbatim transcripts are not significant enough to prevent the objective evaluation of the criteria PWGSC identified (spelling, identification of speakers, punctuation and inaudible segments). The distinctions may support an objection for an individual score in a given instance, but they do not categorically prevent the accurate evaluation of transcripts by reference to the audio. Indeed, in its proposal on this very point, StenoTran conceded that the differences are minor, informing the evaluation team that it “will find subtle differences between what was said and what was transcribed. These are not to be considered errors.”²⁶

25. *Ibid.*, complaint form at 7; *ibid.*, e-mail correspondence at 138.

26. *Ibid.*, technical proposal at 36.

26. Finally, StenoTran objected to being disqualified because it is not permitted to make a late submission of one “minor part” of its proposal; however, the risk of non-compliance was at all times borne by StenoTran. Article 2.1 of the RFSO incorporated by reference the 2006 (2016-04-04) Standard Instructions - Request for Standing Offers - Goods or Services - Competitive Requirements (Standard Instructions). Article 5(2) of the Standard Instructions, titled “Submission of offers”, provides that:²⁷

2. It is the Offeror’s responsibility to:

- a. obtain clarification of the requirements contained in the RFSO, if necessary, before submitting an offer;
- b. prepare its offer in accordance with the instructions contained in the RFSO;
- c. submit by closing date and time complete offer;
- ...
- f. provide a comprehensible and sufficiently detailed offer, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the RFSO.

27. Section 6 (Late offers) of the Standard Instructions provides that “PWGSC will return offers delivered after the stipulated RFSO closing date and time, unless they qualify as a delayed offer as described below.”²⁸ Article 7(2) (Delayed offers) provides as follows: “Misrouting, traffic volume, weather disturbances, labour disputes or any other causes for the late delivery of offers are not acceptable reasons for the offer to be accepted by PWGSC.”²⁹

28. PWGSC correctly concluded that permitting late filing of the recordings would constitute impermissible bid repair. “Bid repair” is a term used to describe the improper alteration or modification of a bid either by the bidder or by the procuring entity after the bid closing date.³⁰ By contrast, a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.³¹ Article 16(1)(a) (Conduct of evaluation) of the Standard Instructions provides that “. . . Canada may, but will have no obligation to . . . a. seek clarification or verification from offerors regarding any or all information provided by them with respect to the RFSO . . .”.³² Here, StenoTran sought to file past the bid closing date supporting documentation that is necessary for the evaluation of its proposal, without which its proposal is non-responsive. That is the very definition of impermissible bid repair.

27. Standard Instructions, article 5(2), available online: <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2006/20#submission-of-offers>.

28. Standard Instructions, section 6.

29. Standard Instructions, section 7.

30. *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT) at para. 55.

31. *Maritime Fence Ltd. v. Parks Canada Agency* (23 November 2009), PR-2009-027 (CITT) at para. 31, citing *Re Complaint Filed by Mechtron Energy Ltd.* (18 August 1995), PR-95-001 (CITT) at 9.

32. Standard Instructions, article 16(1)(a).

29. The Tribunal is always sympathetic towards bidders that have had their perhaps otherwise compliant proposals rejected for procedural errors. However, the Tribunal has repeatedly held that the integrity of the procurement system depends, to an important degree, on the timely receipt of complete bids at the place specified, and in the precise manner stated, in solicitation documents.³³ Here, StenoTran failed to ensure before delivery that its proposal included the required supporting documents. The Tribunal, therefore, finds that PWGSC acted reasonably in not allowing StenoTran to supplement its proposal with required documents after the bid closing date.

DECISION

30. 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

33. *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); *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-2011-030 (CITT) (delivery of bid to recipient of services' address rather than to 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.* (13 May 2015), PR-2014-061 (CITT) (delivery of bid to recipient of services' address rather than to PWGSC); *Wheel Systems International, Inc.* (15 December 2015), PR-2015-044 (CITT) (delivery of bid to wrong fax number); *Keller Equipment Supply Ltd.* (20 October 2016), PR-2016-038 (CITT) (misunderstanding regarding availability of electronic submission; delivery of physical bid 14 minutes late).