Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-060

Centre récréatif d'armes à feu de Montréal Inc.

Decision made
Wednesday, March 8, 2017

Decision issued
Friday, March 10, 2017

Reasons issued
Wednesday, March 22, 2017

Canada

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

CENTRE RÉCRÉATIF D'ARMES À FEU DE MONTRÉAL 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.

Jason W. Downey
Jason W. Downey
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.

2. The complaint relates to a Request for a Standing Offer (RFSO) (Solicitation No. 47419-188062/B) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Canada Border Services Agency, for the acquisition of oleoresin capsicum (OC) defensive sprays.

3. The Centre récréatif d'armes à feu de Montréal Inc. (CRAFM) alleged that its bid should not have been rejected on the ground that the samples it submitted for evaluation did not bear a label fully compliant with the requirements of the RFSO. CRAFM also alleged that the product proposed by the successful bidder did not comply with the mandatory requirements.

4. On March 8, 2017, the Tribunal decided not to conduct an inquiry into the complaint. The reasons for this decision are set out below.

ANALYSIS

5. The Tribunal cannot initiate an inquiry unless all prescribed conditions in respect of the complaint are met. One of these conditions is that the complaint must disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.[3]

6. The complaint does not meet this condition.

The Information Provided in the Complaint Does Not Disclose a Reasonable Indication that PWGSC Erred by Rejecting CRAFM's Proposal

7. CRAFM's bid was rejected on the ground that the label provided with its samples did not comply with the mandatory requirements of the RFSO. CRAFM submitted that the label was only a formality of little importance and that a failure in this regard does not constitute a valid and fair reason for rejecting the bid itself. Through its complaint, CRAFM asked for the opportunity to submit new samples, this time with the correct labels, for a new evaluation.

8. The Tribunal finds no reasonable indication that CRAFM's bid was wrongly rejected.

9. With regard to the evaluation of bids, the trade agreements require that procuring entities apply the criteria specified in the tender documentation.[4] When verifying whether these procedures were followed, the Tribunal shows deference to evaluators with regard to their evaluation of bids. It interferes only if an evaluation appears *unreasonable*, e.g., if it appears that the evaluators have not applied themselves in

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Paragraph 7(1)(c) of the *Regulations*.
4. See, for example, articles 1015(4)(a) and (d) of *NAFTA*.

evaluating a bidder's proposal, that they have wrongly interpreted the scope of a requirement, that they have ignored vital information provided in a bid, that they have based their evaluation on undisclosed criteria or that they have otherwise not conducted the evaluation in a procedurally fair way.[5]

10. In this case, the RFSO included very precise requirements for labels, which were identified as *mandatory criteria*. Moreover, the RFSO expressly indicated that "[p]roduct not meeting all . . . Mandatory Requirements *will be considered non-compliant*" [emphasis added]. More specifically, the RFSO section on mandatory criteria included the following:

> **ANNEX "A": Statement of Requirement**
>
> **3.0 DETAILED DESCRIPTION (Evaluation Grid)**
>
> **The Bidder must clearly demonstrate how the proposed product complies with each of the requirements.** Product not meeting all the following Mandatory Requirements will be considered non-compliant.
>
> . . .
>
> The technical evaluation will take place in two (2) phases.
>
> . . .
>
> Phase 2 consists of a physical confirmation/test for the items indicated on the evaluation grid. If a product fails the visual inspection or the physical test the bid shall be considered non-compliant and the next lowest cost product shall be inspected and tested. The process shall continue until one product passes.

Para.	Title/Test	Requirement	Confirmation method	Phase
3.7	Marking/ Instructions	Bilingual text printed on canister. The label must contain: • Title: Irritant Spray (OC) (font size of 18 pts min) • Manufacturer's Identification • Directions on care and use • Contents/Ingredients • First Aid Instructions • Expiry Date • Individual canisters shall have lot numbers printed on the label and identified as such using the wording: "LOT" number	Visual confirmation	2

11. Moreover, CRAFM admits that its labels were not fully compliant, as assessed by PWGSC. In its complaint, CRAFM agrees that the font of the words "irritant spray" may not have been 18 points and it

5. See, for example, *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 33.

does not contest the fact that the lot numbers were not indicated as such by the word "LOT" on the label. CRAFM also admits that samples with the wrong labels were sent to PWGSC in error. [6]

12. Consequently, to meet the RFSO criteria, PWGSC was obliged to reject CRAFM's proposal.

13. CRAFM's argument that the deficiencies in the labels did not constitute a valid or fair reason for rejecting its bid is inconsistent with the *mandatory* evaluation criteria stated in the RFSO. Mandatory criteria must be rigorously applied and a criterion designated as such cannot be set aside in a discretionary manner by the evaluators. This is one of the cornerstones of Canada's procurement system.[7]

14. It is also widely recognized that in a procurement process, it is incumbent upon a bidder to ensure that its proposal is compliant with all essential elements of a solicitation and to exercise due diligence in the preparation of its proposal to make sure that it is compliant.[8]

15. In this regard, CRAFM's position that it should have another opportunity to submit other samples with the appropriate labels cannot be accepted either.

16. As PWGSC has rightly concluded, the RFSO process does not allow a bidder to benefit from such a second chance. The RFSO criteria, cited above, indicate that, if a product did not satisfy the visual or physical inspection, the bid would be considered non-compliant and the next product with the lowest cost would be inspected and tested until a compliant product was found.[9] Giving CRAFM a second opportunity to present compliant samples would be contrary to these rules and would undermine the equal treatment of all bidders.[10]

17. Consequently, with respect to the first ground of complaint, the information available to the Tribunal does not disclose a reasonable indication that the procurement process followed by PWGSC was contrary to the applicable trade agreements.

The Information Provided Does Not Disclose a Reasonable Indication that the Product of the Successful Bidder Was Non-compliant

18. CRAFM also alleged that the product proposed by Rampart International Corp. (Rampart), the successful bidder, did not comply with the mandatory requirements. CRAFM alleged that this product did not comply with the requirement for an average of 8 to 10 bursts per second, which was one of the mandatory elements on the RFSO evaluation grid:

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6. Complaint form at 7, 9.
7. *Siemens Westinghouse Inc. v. Canada*, 2000 CanLII 15611 (FCA), at para. 18; see also *TekTronix Canada* (20 November 2015), PR-2015-041 (CITT) at para. 16.
8. *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 34.
9. Also, see section 4 of the RFSO, article 4.2.1: "The bidder must provide three samples of the product being offered . . . within 15 calendar days from the date of request. . . . If the sample does not meet the requirements of the bid solicitation or the Bidder fails to comply with the request of the Contracting Authority, the bid will be declared non-responsive."
10. Changes to bids outside of the rules set out in the call for tenders, referred to as bid repair, are prohibited. The prohibition against bid repair is intended to ensure that all bidders are given a fair and equal opportunity in the bid evaluation process. *CGI Information Systems and Management Consultants Inc. v. Canada Post Society and Innovapost Inc.* (14 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 127; *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 45, citing *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT) at para. 55.

Para.	Title/Test	Requirement	Confirmation Method	Phase
3.4	Volume/Weight	Average number of 1 second bursts 8 to 10	Physical – deploy contents and verify number of 1 second bursts	2

19. CRAFM indicated to PWGSC that the product it had proposed, namely, the Sabre Red product, was the only one that met the requirement for 8 to 10 bursts. On February 16, 2017, CRAFM wrote the following to PWGSC:

> . . . Sabre Red are the only manufacturer who meets that requirement and the nozzle is exclusive to Sabre Red. The closest bursts in the industry that meets this would be 4 seconds.

20. The information provided in the complaint also indicates that the parties had discussed the issue by telephone. On February 20, 2017, PWGSC sent CRAFM the following summary of their conversation:

> We also discussed your concern and you stating that your product brand is the only one able to meet the 8-10 one second bursts. I explained that the bidder who was awarded the Standing Offer did meet this mandatory criteria of which I was present to witness during the physical evaluation.

21. After being notified of the brand name of the product proposed by Rampart (Vexor), CRAFM contacted a supplier of Sabre Red products.[11] Following that conversation, CRAFM sent another letter to PWGSC, which included the following statement obtained from this supplier of Sabre Red products:

> Vexor [i.e., the product proposed by Rampart] does not get 8 to 10 one second bursts. We have a machine in house that measures 1 second bursts. I can guarantee they do not as we have tested this. How do we go about formally protesting? We protested an OPP bid a couple years back on the same requirement and against the same supplier and won as it was determined they did not meet this requirement.[12]

22. The issue before the Tribunal is whether the evidence provided by CRAFM is sufficient to disclose a reasonable indication that PWGSC evaluated the Rampart samples in an unreasonable manner and thereby contravened the trade agreements by concluding that these samples met the requirements of the RFSO. To demonstrate the existence of a reasonable indication of a breach of the trade agreements, the complainant must establish a *prima facie* case by adducing sufficient evidence to demonstrate a possible error in the evaluation made by the procuring entity.[13]

23. In this case, although the information contained in the email sent to CRAFM by the supplier of Sabre Red products indicates that the company had tested *a* Vexor product, nothing indicates that these tests involved the same Vexor product as that proposed by Rampart in the RFSO. There is no indication that this was the *same* Vexor product as the sample submitted in connection with the RFSO; the Tribunal cannot speculate on this point.

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11. Complaint form at 5.
12. See in this regard the email of February 20, 2017, from the supplier of Sabre Red products to CRAFM attached to the complaint.
13. *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (24 September 2013), PR-2013-016 (CITT) at para. 27; *Secure Computing LLC* (12 April 2012), PR-2012-001 (CITT) at paras. 15-18. See also *Tyco International of Canada o/a SimplexGrinnell* (14 April 2011), PR-2011-002 (CITT) at para. 16; *HeartZap Services Inc*. (15 September 2016), PR-2016-033 (CITT) at paras. 11-12.

24. In addition, even though this supplier of Sabre Red products may have successfully challenged the evaluation of a Vexor product in a different bidding process a few years ago, nothing in the complaint indicates that it is the same product as the one provided in the samples submitted by Rampart in the RFSO, or that these samples do not now meet the requirement in question.

25. The information on the record indicates instead that a PWGSC employee personally witnessed that this requirement was met. No additional evidence was filed to question the reasonableness of PWGSC's findings with respect to the compliance of the Rampart samples.

26. The information provided in the complaint is therefore insufficient to disclose a reasonable indication that the evaluation carried out by PWGSC was in breach of the trade agreements.

DECISION

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

Jason W. Downey
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Presiding Member