



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-046

8146292 Canada Incorporated

*Decision made
Thursday, January 11, 2018*

*Decision and reasons issued
Friday, January 19, 2018*

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

8146292 CANADA INCORPORATED

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

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 11, 2018, 8146292 Canada Incorporated (8146292 Canada) filed a complaint regarding a Request for Proposal (RFP) (Solicitation No. 01804-180206/A) issued by the Department of Public Works and Government Services (PWGSC), on behalf of Agriculture and Agri-Food Canada, for a portable fluorometer.

3. 8146292 Canada complained that PWGSC improperly refused to evaluate its bid on the grounds that it had delivered it by facsimile.

4. As a remedy, 8146292 Canada requested that the bids be re-evaluated and that it be compensated for lost profit and lost opportunity. 8146292 Canada also requested reimbursement of its bid preparation and complaint costs.

BACKGROUND

5. PWGSC issued the RFP on October 30, 2017, with a solicitation closing date of December 11, 2017. On December 10, 2017, 8146292 Canada submitted its bid by facsimile to the coordinates provided on the first page of the solicitation documents,³ as follows:

RETURN BIDS TO:
RETOURNER LES SOUMISSIONS À:
Bid Receiving Public Works and Government
Services Canada/Réception des soumissions
Travaux publics et Services gouvernementaux
Canada
1713 Bedford Row
Halifax, N.S./Halifax, (N.É.)
B3J 1T3
Nova Scotia
Bid Fax: (902) 496-5016

[Emphasis added]

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Additional information submitted January 10, 2018.

6. On January 3, 2018, a contract was awarded to Hoskin Scientific Limited of Burlington, Ontario.

7. On January 4, 2018, 8146292 Canada was informed during a telephone conversation with the contracting authority that its bid had not been accepted because it was submitted via facsimile. According to 8146292 Canada, during the telephone call the contracting authority directed it to clause 2.2 of the RFP, which provides as follows:

2.2 Submission of Bids

Bids must be submitted only to Public Works and Government Services Canada (PWGSC) Bid Receiving Unit by the date, time and place indicated on page 1 of the bid solicitation.

Due to the nature of the bid solicitation, bids transmitted by facsimile to PWGSC will not be accepted.

[Emphasis added]

8. According to 8146292 Canada, the reason given by the contracting authority for the inclusion of this clause was to ensure that the bids were clear and legible.⁴

9. 8146292 Canada in turn directed the contracting authority to the coordinates provided on the first page of the solicitation documents, which include a “Bid Fax” number under the heading “RETURN BID TO/RETOURNER LES SOUMISSIONS À”. According to 8146292 Canada, the contracting authority responded that these coordinates were always included as they form part of the standard template for RFPs, and acknowledged that other bidders had made the same “mistake” in the past.⁵

10. 8146292 Canada submitted its complaint to the Tribunal on January 11, 2018.⁶ 8146292 Canada submitted that PWGSC should not have disqualified its bid on the basis that it was submitted by facsimile because there was contradictory information regarding acceptable modes of transmission in the solicitation documents. 8146292 Canada further submitted that it should have been awarded the contract as its bid was the lowest and it met all mandatory requirements.⁷

11. Finally, 8146292 Canada submitted that it had successfully submitted a bid for another solicitation to the same facsimile number on the same day, for which it was ultimately awarded a contract. According to 8146292 Canada, this shows that the inclusion of clause 2.2 was unjustified as bids received by facsimile were clear and legible.⁸

ANALYSIS

12. 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

4. Complaint at 9.

5. *Ibid.* at 8-9.

6. On January 4, 2018, 8146292 Canada submitted a complaint to the Office of the Procurement Ombudsman (OPO). On January 9, 2018, the OPO informed 8146292 Canada that it did not have jurisdiction to launch an investigation and suggested that 8146292 Canada contact the Tribunal. Attachment 1 to the Complaint.

7. Complaint at 9.

8. *Ibid.*

agreements,⁹ which in this case are the *North American Free Trade Agreement*¹⁰ and the *Canadian Free Trade Agreement*.¹¹ The complaint must also be filed within the prescribed time limits.

13. The Tribunal finds that 8146292 Canada's complaint meets conditions (a) and (b) and is timely, but 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).

14. In particular, 8146292 Canada's complaint does not indicate a breach of Article 506(6)(d) of the *CFTA* and Article 1010(2)(e) of *NAFTA*, which require that a procuring entity clearly indicate to potential suppliers the address and final date for the delivery of bids in the solicitation documents.

15. Clause 2.2 of the RFP explicitly and clearly provides that bids transmitted by facsimile to PWGSC will not be accepted. While the inclusion of the "Bid Fax" number under the heading "RETURN BID TO/RETOURNER LES SOUMISSIONS À" is potentially confusing, the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation, including its delivery to the appropriate receipt point, ultimately resides with the bidder. Accordingly, as the Tribunal has stated in the past, it is incumbent upon the bidder to exercise due diligence in the preparation and delivery of its proposal.¹²

16. In this case, it is not clear from the narrative set out in the complaint that 8146292 Canada did exercise such due diligence as it was apparently unaware of the existence of clause 2.2 prior to speaking with the contracting authority.¹³ Further, even if 8146292 Canada had been aware of clause 2.2, there is no evidence that it sought clarification from PWGSC of the apparent discrepancy between that clause and page 1 of the RFP prior to submitting its bid.

17. The Tribunal is always sympathetic towards bidders that have had their perhaps otherwise compliant proposals rejected for errors such as the failure to follow proper bid delivery methods. 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.¹⁴ For PWGSC to decide to accept a bid submitted in a manner prohibited by the

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

10. *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://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [*NAFTA*].

11. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017) [*CFTA*].

12. *PA Consulting Group* (20 September 2011), PR-2011-030 (CITT) [*PA Consulting Group*] at para. 13.

13. Complaint at 9.

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); *Ex Libris (USA) Inc.* (27 July 2009), PR-2009-034 (CITT) (delivery of bid after bid closing time); *PA Consulting Group* (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.* (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); *Keller Equipment Supply Ltd.* (20 October 2016), PR-2016-038 (CITT) (misunderstanding regarding availability of electronic submission, delivery of physical bid 14 minutes late).

RFP would be unfair to the other bidders that incurred the cost of sending a hard copy to PWGSC's physical address, and could just as easily give rise to further complaints to the Tribunal. The Tribunal therefore finds that PWGSC acted reasonably in disqualifying 8146292 Canada's bid because it was submitted by facsimile.

18. However, the Tribunal is concerned by the fact that, by PWGSC's own admission, this is not the first case in which a bidder has been disqualified for mistakenly sending a bid to the facsimile number listed on the first page when that was not permissible under the terms of the solicitation. The Tribunal notes that, in similar circumstances, it has previously urged PWGSC to consider revising the cover page of RFPs to minimize the risk of errors.¹⁵ The Tribunal encourages PWGSC to ensure in future that the "Bid Fax" number is removed from the standard template cover page in instances where bids transmitted by facsimile will not be accepted.

DECISION

19. 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

15. *Rebanks Pepper Littlewood Architects Inc.* (23 November 2016), PR-2016-044 (CITT) at para. 22.