



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2017-028

Yeva Vision

*Decision made
Wednesday, October 18, 2017*

*Decision and reasons issued
Friday, October 20, 2017*

*Reasons issued
Tuesday, October 31, 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

YEVA VISION

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.

Daniel Petit _____
Daniel Petit
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. On October 12, 2017,³ Yeva Vision filed this complaint with regard to a request for standing offers (RFSO) (solicitation No. W8484-15P2PE/C) issued by the Department of Public Works and Government Services (PWGSC)⁴ on behalf of the Department of National Defence (DND) for the provision of ballistic eyewear.

3. Yeva Vision claims that PWGSC evaluated its financial bid improperly. Yeva Vision also questions the usefulness of issuing the RFSO and cancelling a previous request for standing offers (solicitation No. W8484-15P2PE/B; hereafter the “previous RFSO”) that the RFSO in this case replaced. As a remedy, Yeva Vision requested that the proposals be re-evaluated, that the RFSO be cancelled and that a new, clearer request for standing offers be issued.

4. Having reviewed the complaint, the Tribunal decided not to conduct an inquiry into it for the following reasons.

5. At the outset, the Tribunal notes that, insofar as part of the complaint filed by Yeva Vision appears to dispute the cancellation of the previous RFSO, the Tribunal has already ruled on this matter in File No. PR-2017-007,⁵ in which the Tribunal decided not to conduct an inquiry into the complaint. Yeva Vision cannot dispute through this new complaint what has already been decided.⁶

6. With regard to the complaint filed by Yeva Vision concerning the evaluation of its financial bid in response to the RFSO, the Tribunal notes that it may conduct an inquiry only where certain conditions are met.⁷ One of these conditions requires that the information provided by the complainant and any other information examined by the Tribunal in respect of the complaint discloses a reasonable indication that the procurement process was not conducted in accordance with the applicable trade agreements. In the present case, Yeva Vision’s complaint does not meet this condition.

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

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

3. The Tribunal received documents from Yeva Vision on October 10, 11 and 12, 2017. In accordance with subsection 30.11(2) of the *CITT Act* and paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* (SOR/91-499), the Tribunal considered the complaint as filed on October 12, 2017.

4. On November 4, 2015, the Government of Canada announced that the Department of Public Works and Government Services would be changing its name to Public Services and Procurement Canada.

5. The Tribunal determined in File No.⁹PR-2017-007 that Yeva Vision had not filed its complaint on the alleged unjustified cancellation of the solicitation at issue within 10 business days after PWGSC denied it relief following the objection that Yeva Vision had made in this respect. Consequently, its complaint was filed outside the time limit set out in section 6 of the *Regulations*.

6. *TPG Technology Consulting Ltd.* (5 December 2016), PR-2016-045 (CITT) at para. 12; *TA Instruments* (23 September 2011), PR-2011-029 (CITT) at para. 8.

7. Sections 6 and 7 of the *Regulations*.

7. The trade agreements require government institutions to clearly state the criteria for evaluating proposals in a procurement process and to evaluate these proposals in accordance with the criteria set forth.⁸ It is also well established that a procuring entity will comply with these obligations if it conducts an evaluation that is *reasonable*. As a result, 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 proposal, 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.⁹

8. The RFSO, which Yeva Vision received on March 31, 2017, sought to establish a standing offer for the purchase of prescription ballistic protective lenses.¹⁰ In particular, the task of the successful supplier would be to provide prescription lenses for ballistic lens inserts provided by the Government of Canada.¹¹

9. The method for evaluating the financial bids was described in annex C of the RFSO. Annex C contained two tables to be filled out by bidders. Table 1 was called "Lenses Single Vision Ballistic Polycarbonate". It then listed each year of the expected duration of the standing offer and requested that bidders provide a firm unit price for each year. Table 2, called "Lenses Bifocals Ballistic Polycarbonate", also required bidders to provide a firm unit price for this second type of lenses for each year of the standing offer.

10. Annex C also included table 3, which was for the evaluators to fill out. Essentially, the evaluators were to take the firm unit prices provided in tables 1 and 2 by the bidders for each year and for each of the two types of lenses and multiply them by an annual quantity stated in table 3. The annual quantities were provided for evaluation purposes only. The evaluators were to add up these subtotals to arrive at a total price for evaluation purposes.

11. On April 5, 2017, Yeva Vision submitted a financial bid in response to the RFSO. In tables 1 and 2, Yeva Vision entered firm prices of \$15 per unit. However, the following note was included next to the prices in several places in the bid: "Note : All Our prices are per EACH lens alone, in CAD\$."

8. See, for instance, articles 1015(4)(a) and (d) of the *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); and article 506(6) of 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/>>.

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

10. The RFSO describes the lenses sought as follows on page 3: "prescription lenses for ballistic lens inserts for members of the [Canadian Armed Forces] who need prescription Eye Wear."

11. RFSO, section 1.2.1. See also annex A of the RFSO on page 20. "The Contractor will provide CAF members with polycarbonate, scratch-resistant lenses, inserted into a frame supplied by the Department of National Defence (DND) for use with ballistic Eye Wear. The Contractor will use a software tool, also provided by DND, to modify normal lenses to a finalized prescription for ballistic lenses. . . . [t]he completed insert frames with the modified lenses are then to be sent back to the requesting Canadian Armed Forces Health Services Centre" See also page 21 under "Deliverables": "The Contractor must: . . . deliver lens fitted polycarbonate inserts to the requesting CFH Svcs C"

12. On May 11, 2017 during the evaluation, PWGSC asked Yeva Vision to “clarify” its bid. The relevant e-mail states the following:

... As per the RFSO, Annex C – Tables 1 and 2, the requirement is for lenses and the unit of measure is for a pair of lenses forming one frame. In your financial offer, Canada has noted that you have stated as follows: “All our prices are per EACH lens alone, in CAD\$”. Canada therefore requires the following clarifications:

Can you please confirm whether the firm unit price submitted in your financial bid is for one lens only or for a pair of lenses forming one frame. If the price submitted is for one lens only, please confirm that the extended firm price per pair of lenses forming one frame is \$15.00 multiplied by 2 for a total of \$30.00 per frame. ...

13. The same day, Yeva Vision answered PWGSC’s question, disputing the interpretation adopted by PWGSC according to which firm prices concerned a unit consisting of a pair of lenses forming one frame. It also answered PWGSC’s question regarding its bid price as follows:

... 2. Please, see our answer on your request :

1. Our price as our Bid in Table 1 is 15\$ per lens Single Vision Ballistic Polycarbonate 602100

2. Our price as our Bid in Table 1 is 15\$ per lens Bifocal Ballistic Polycarbonate 602099

As PRE-AUTHORIZATION VISION(EYE)-CARE BALLISTIC FORM, if the request is to supply 1 lens only, the price will be 15\$, if we need to supply 2 lenses, the price will be 30\$.

14. On October 5, 2017, Yeva Vision was informed that its total price was higher than that of the successful bidder. Following an objection made by Yeva Vision, PWGSC denied it relief, and explained in detail how it had calculated the total price of its bid. In particular, PWGSC confirmed that it used a price of \$30 per unit, in accordance with the May 11, 2017, correspondence between the parties.

15. Before the Tribunal, Yeva Vision claimed that it presented a firm price of \$15 per unit. It disputed the fact that PWGSC doubled its unit price.

16. The information on file indicates that PWGSC interpreted the RFSO as requiring prices per pair of lenses, that is per frame, whereas Yeva Vision interpreted the RFSO as requiring prices per single lens.

17. The Tribunal notes that the tables in annex C refer to *lenses*, plural. Moreover, as stated above, it was clear in the RFSO that the Government of Canada was seeking a supplier to equip frames provided by the Government with lenses with the required prescription. It goes without saying that each frame has two lenses.

18. In this context, nothing in the file reasonably indicates that PWGSC’s interpretation that “. . . the requirement is for lenses and the unit of measure is for a pair of lenses forming one frame” was incorrect.

19. In its complaint, Yeva Vision referred to the fact that the RFSO did not contain a note that was in the documentation for the previous RFSO, which the RFSO in question replaced. In the previous RFSO, the note Yeva Vision referred to states that “[p]roposed prices include a pair of lenses and all costs associated with the insertion of the lenses into the frame provided by the member”¹² [translation].

20. The requirements of a procurement must be interpreted based on the terms of the procurement in question and not in light of requirements appearing in other procurement processes.¹³ Furthermore, the Tribunal is of the opinion that Yeva Vision should reasonably have noticed that the RFSO did not have the

12. Previous RFSO, p. 25.

13. See, for example, *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at para. 124.

note in question upon reading the RFSO. However, if the absence of this note caused Yeva Vision to be uncertain as to the unit of measure for which a price was to be provided in the RFSO, it was its responsibility to clarify this uncertainty with PWGSC, and the appropriate time to do so was before submitting its bid. Potential suppliers are responsible for ensuring that their bids adequately address the evaluation criteria of a call for tenders, which necessarily includes ensuring that they have correctly understood the requirements of the call for tenders and requesting the required clarifications in time.¹⁴ In this case, rather than requesting clarification, Yeva Vision chose to submit a bid based on a unit price for a single lens.

21. Moreover, fundamentally, the Tribunal does not find any reasonable indication that PWGSC misunderstood or incorrectly evaluated Yeva Vision's financial bid. On the contrary, PWGSC read the terms of Yeva Vision's bid, including the note indicating that its unit prices were for a single lens. In addition, being of the opinion that the RFSO instead asked for unit prices per pair of lenses forming one frame, PWGSC asked Yeva Vision to confirm whether its price for two lenses was indeed double the price for one lens. Yeva Vision explicitly confirmed the accuracy of this calculation by stating the following: "if the request is to supply 1 lens only, the price will be 15\$, if we need to supply 2 lenses, the price will be 30\$."

22. The Tribunal therefore finds that Yeva Vision's allegation that PWGSC "changed the prices we actually submitted"¹⁵ [translation] is unfounded. PWGSC used the price per lens submitted by Yeva Vision and applied it to the unit of measure and quantities required in the RFSO. In this way, PWGSC correctly evaluated the price "actually" submitted by Yeva Vision for what was described in the RFSO. In conclusion, no evidence before the Tribunal indicates that Yeva Vision's bid was evaluated on a different basis than that used to evaluate the other bids.

23. For these reasons, the Tribunal finds that the information on the record does not disclose a reasonable indication that the procurement process in this case breached the requirements of the trade agreements.

DECISION

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

Daniel Petit
Daniel Petit
Presiding Member

14. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) at para. 76. See also *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) at paras. 18–21, in which the Federal Court of Appeal stated as follows: "... potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. . . . The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent."

15. Complaint letter from Yeva Vision to the Tribunal dated October 10, 2017.