



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2003-082

Bosik Vehicle Barriers Ltd.

v.

Department of Public Works and
Government Services

*Determination issued
Thursday, May 6, 2004*

*Reasons issued
Thursday, May 13, 2004*

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IN THE MATTER OF a complaint filed by Bosik Vehicle Barriers Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

BOSIK VEHICLE BARRIERS LTD.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Bosik Vehicle Barriers Ltd. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1 and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

The statement of reasons will follow at a later date.

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STATEMENT OF REASONS

COMPLAINT

1. On March 22, 2004, Bosik Vehicle Barriers Ltd. (Bosik) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation No. W0103-031TAY/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of National Defence (DND), for the supply, installation, testing and putting into proper operation of rising road barricades at Canadian Forces Base (CFB) Esquimalt.

2. Bosik alleged that the winning bidder, SPX Canada Ltd. (SPX), was not compliant with one of the mandatory requirements of the Request for Proposal (RFP). More particularly, Bosik alleged that SPX proposed a product that did not meet the activation time requirement provided in the RFP.

3. Bosik is requesting, as a remedy, that PWGSC cancel the contract awarded to SPX and award it instead to Bosik, the only other technically compliant bidder. Alternatively, it requested that it be compensated for lost profit or lost opportunity for having been denied the opportunity to perform the contract. Bosik further requested that it be awarded its reasonable bid preparation costs for this solicitation, as well as its complaint costs. Finally, Bosik requested that the Tribunal deal with this complaint under the express option set out in rule 107 of the *Canadian International Trade Tribunal Rules*.²

4. On March 31, 2004, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ The Tribunal also informed the parties that, in accordance with subrule 107(4) of the *Rules*, the Tribunal would apply the express option in this case. On April 7, 2004, SPX, the contract awardee, asked for and was granted leave to intervene in the matter before the Tribunal. On April 13, 2004, PWGSC filed its Government Institution Report (GIR) with the Tribunal. On April 15, 2004, the Tribunal requested additional information from PWGSC regarding the GIR, which was provided to the Tribunal on April 16, 2004. Bosik and SPX filed comments on the GIR on April 21, 2004. Bosik filed a public version of its comments on the GIR, as well as its comments on the additional information provided by PWGSC, with the Tribunal on April 22, 2004. The Tribunal notes that neither PWGSC nor SPX requested that the Tribunal reconsider its decision to proceed via the express option.

5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

6. The RFP was issued by PWGSC, on behalf of DND, on December 22, 2003, with a closing date for the receipt of bids of January 16, 2004.

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

2. S.O.R./91-499 [*Rules*].

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

7. Page 5 of Part 2 of the RFP, under the heading “Evaluation”, provided, in part:

Basis of Selection: To be considered responsive, bids must meet ALL the requirements of this solicitation including the MANDATORIES. Any bid not meeting ALL requirements will be given no further consideration. The lowest aggregate priced responsive bid will be recommended for award of a contract or issuance of a standing offer, as the case may be.

8. Page 6 of part 2 of the RFP, which had to be returned by each bidder with its proposal, provided, in part, the following:

	MANDATORY REQUIREMENTS	MEETS	
Bidders are to bid on barricades that have a vehicle impact speed rating of:			
1	Minimum of 30 MPH (48 KPH)	YES	no
2	All barricades shall be capable of being remotely activated by a single switch, either independently or after activated	YES	no
3	All barricades shall come with a separately controllable Stop Light and an audible warning option	YES	no
4	All barricades shall have a manual override capability so that they can be manually operated in the event of a power failure	YES	no
5	Activation time shall be no more than 3 seconds	YES	no
6	All barricades shall be surface mounted and pop up when activated	YES	no
7	All barricades shall operate with 110 volts power	YES	no
8	Rising Arm Barriers shall have a 12 foot arm	YES	no

FAILURE TO ADDRESS AND MEET THE MANDATORY REQUIREMENT WILL RESULT IN YOUR OFFER BEING DECLARED NOT RESPONSIVE AND RECEIVING NO FURTHER CONSIDERATION.

Signature of Authorized Representative for Compliance	Date
PRINT NAME AND TITLE OF POSITION WITH COMPANY	

Bids that fail to provide the information requested and required by the Contracting Authority to fully evaluate the submission will be deemed non-responsive and given no further consideration

9. According to PWGSC, three proposals were received, including one from Bosik and one from SPX. The third proposal was determined to be non-compliant for unspecified technical reasons. PWGSC determined that SPX had submitted the lowest-priced responsive proposal and, on January 30, 2004, it awarded the contract to SPX and informed the other potential suppliers accordingly.

10. On February 12, 2004, the Tribunal accepted a complaint⁴ from Bosik concerning another element of the procurement process. As an intervener, SPX submitted documents on March 5, 2004, in support of its position regarding that complaint. SPX submitted that, as a result of amendment No. 3 to the RFP, it had

4. *Re Complaint Filed by Bosik Vehicle Barriers Ltd.* (29 March 2004), PR-2003-076 (CITT).

been required to change from the product that it was proposing to a Delta Model MP5000 Portable Barrier-Crash Certified Barrier System (MP5000). On March 22, 2004, Bosik submitted its complaint to the Tribunal, alleging that the MP5000 did not meet the mandatory criteria for activation.

POSITIONS OF THE PARTIES

Bosik's Position

11. Bosik submitted that the MP5000 specification sheet⁵ lists the rising speed of the MP5000 as "adjustable within the range of 5-12 seconds." This, Bosik submitted, is greater than the maximum allowable rising speed of "no more than 3 seconds" identified by mandatory requirement No. on page 6 of the RFP.

12. According to Bosik, as PWGSC was required to request clarification on this criterion from SPX, SPX's proposal did not meet the requirement on page 6 of the RFP that states: "Bids that fail to provide the information requested and required by the Contracting Authority to fully evaluate the submission will be deemed non-responsive and given no further consideration." Bosik submitted that SPX's proposal should have been disqualified on that basis.

13. Bosik also submitted that the clarification about "factory adjustments" that was provided did not demonstrate that the MP5000 was capable of meeting the minimum activation time. Bosik submitted that SPX's proposal and subsequent clarification spoke only to what the product might do rather than whether it could meet the mandatory criteria. Bosik also argued that, if the factory adjustments contained in the clarification were proposed after the bid was submitted, then they should not be included, as they had the effect of modifying deficiencies in the original bid.

14. According to Bosik, based on the provisions on pages 5 and 6 of the RFP, SPX's bid should not have been given any further consideration once this element of its bid had been reviewed by PWGSC. Bosik submitted that its bid was therefore the only bid that should have been found technically compliant and that it should have been awarded the contract. Bosik submitted that, given the circumstances of this procurement, awarding the contract to anyone other than Bosik was in violation of the trade agreements.

PWGSC's Position

15. PWGSC submitted that SPX's proposal was found to comply with the essential requirements of the RFP and, on that basis, SPX was awarded the contract. PWGSC submitted that SPX's proposal advised that it met all the specifications and specifically addressed each of the mandatory elements of the RFP, including the one relating to activation. According to PWGSC, on January 28, 2004, it asked for and received confirmation from SPX that the MP5000 could be factory adjusted for an activation time of three seconds.

16. PWGSC submitted that the specifications attached to Bosik's complaint were merely "General Specifications" for the MP5000 and that they do not purport to be the actual specifications of the barricades proposed by SPX. According to PWGSC, the inclusion of the words "standard rising speed" clearly implies the ability to be adjusted to a speed other than a standard speed. PWGSC submitted that general specifications that are not included in a proposal cannot reveal whether the proposal conforms to the requirements of the RFP.

5. Complaint, Appendix "G".

17. PWGSC also submitted that the Tribunal was imposing unnecessary obligations on the evaluators by using information not included in SPX's proposal to judge whether its proposed barricade met the mandatory requirements of the RFP. PWGSC further submitted that using information outside the contents of a proposal is tantamount to re-evaluating the proposal after engaging in bid repair or bid destruction. PWGSC submitted that the Tribunal has consistently held⁶ that a proposal may not be supplemented after bid closing and must be evaluated using only the contents of the proposal and any clarifications. According to PWGSC, evaluators cannot be held to a standard that cannot be met without breaching the trade agreements, and it is beyond the Tribunal's jurisdiction to use information that was not included in SPX's proposal and therefore not before the evaluators.

18. According to PWGSC, product compliance is a matter of contract performance. PWGSC submitted that inspecting for compliance with the terms of the contract is a matter of contract administration and that the Tribunal has consistently held that it does not have jurisdiction over such matters.⁷ PWGSC submitted that the Tribunal has accepted the principle that a bidder may be declared non-compliant after the award of a contract⁸ with a vendor performance clause.

19. PWGSC requested that the complaint be dismissed and that it be awarded its full costs as a result of the burden imposed upon it by the use of the express option.

SPX's Position

20. SPX submitted that it supported and endorsed all the assertions made by PWGSC. SPX submitted that its proposal complied with the mandatory requirements in the RFP, that the award of the contract complied with requirements of the trade agreements and that Bosik made a number of erroneous assumptions regarding SPX's proposal.

21. SPX also submitted that Bosik's unsupported allegations resulted in a second inquiry that proved costly for SPX and that it requested the costs of its participation in these proceedings. SPX submitted that section 1.1 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)* provides that the Tribunal may "award costs of, and incidental to, any proceedings before it in relation to a complaint, on a final or interim basis, and the costs may be fixed at a sum certain or may be taxed; and direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed." SPX submitted that, in accordance with section 1.3, the Tribunal could and should depart from its flat fee rate and award SPX full recovery of its costs.

6. *Re Complaint Filed by NOTRA Environmental Services Inc.* (16 December 1997), PR-97-027 (CITT); *Re Complaint Filed by Safety Projects International Inc.* (24 August 1998), PR-98-007 (CITT); *Re Complaint Filed by Métro Excavation inc.* (5 November 1999), PR-99-016 (CITT); *Re Complaint Filed by TELUS Integrated Communications Inc.* (2 November 2000), PR-2000-017 and PR-2000-035 (CITT); *Re Complaint Filed by Computer Talk Technology, Inc.* (26 February 2001), PR-2000-037 (CITT); *Re Complaint Filed by Foundry Networks* (30 August 2001), PR-2001-006 (CITT); *Re Complaint Filed by IBM Canada Limited* (10 April 2003), (CITT); *Re Complaint Filed by Southern California Safety Institute, Inc.* (22 December 2003), PR-2003-047 (CITT); *Re Complaint Filed by TPG Technology Consulting Ltd.* (28 November 2003), PR-2003-065 (CITT).

7. *Re Complaint Filed by Liftow Limited* (13 October 1999), PR-99-017 (CITT); *Re Complaint Filed by Eurodata Support Services Inc.* (30 July 2001), PR-2000-078 (CITT); *Re Complaint Filed by Équipement Industriel Champion Inc.* (5 June 2002), PR-2001-071 (CITT).

8. *Re Complaint Filed by Northern Micro Inc.* (12 July 1999), PR-99-002 (CITT).

22. SPX submitted that the complaint should be dismissed with full indemnity costs payable to SPX by Bosik. In the alternative, SPX submitted that its costs should be paid by the Government of Canada.

TRIBUNAL'S DECISION

23. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which in this case are the *Agreement on Internal Trade*,⁹ the *North American Free Trade Agreement*¹⁰ and the *Agreement on Government Procurement*.¹¹

Jurisdictional Issues

24. Before turning to the merits of this complaint, it is first necessary to deal with PWGSC's contention that the Tribunal lacks jurisdiction to inquire into the complaint because it involves a matter of contract administration. PWGSC also submitted that it is beyond the Tribunal's jurisdiction to use information that was not included in SPX's proposal to determine whether SPX's proposal conformed to the essential requirements of the RFP.

25. The Tribunal accepted this complaint for inquiry on the basis of a ground of complaint that alleges that PWGSC improperly evaluated SPX's bid as being compliant and, therefore, incorrectly awarded the contract to SPX. Accordingly, the Tribunal considers that this complaint is clearly within the domain of a bid challenge and does not relate to post-contract award actions on the part of PWGSC. Therefore, the Tribunal finds that PWGSC's first jurisdictional argument has no merit.

26. Concerning the second jurisdictional issue raised by PWGSC, the Tribunal notes that its inquiry relates to whether PWGSC evaluated the compliance of SPX's proposal appropriately in light of the provisions of the applicable trade agreements. This is not necessarily the same as determining whether SPX's proposal, in absolute terms, conformed to the requirements of the RFP. Under the trade agreements, the government institution, in this case PWGSC, must make awards in accordance with the criteria and essential requirements specified in the tender documentation. The Tribunal agrees with PWGSC that, ordinarily, the obligation will be met when the government institution makes a reasonable evaluation, in good faith, of the competing bid documents submitted in response to the RFP. However, in inquiring into PWGSC's evaluation, nothing in the trade agreements prevents the Tribunal from considering other relevant information that is not contained in SPX's bid. Accordingly, the Tribunal finds that PWGSC's second jurisdictional argument has no merit.

9. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

10. 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

11. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

Merits of the Complaint

27. Article 506(6) of the *AIT* reads, in part, as follows:
- The 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.
28. Article 1015(4) of *NAFTA* reads, in part, as follows:
- An entity shall award contracts in accordance with the following:
- (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;
- (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.
29. Article XIII(4) of the *AGP* reads, in part, as follows:
- (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation.
- (c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.
30. The issue before the Tribunal is whether PWGSC properly evaluated SPX's proposal when it determined that the product proposed by SPX, the MP5000, met mandatory requirement No. 5, "Activation time shall be no more than 3 seconds".
31. SPX addressed mandatory requirement No. 5 both in the text of its bid¹² and in the product literature¹³ that was included in its bid. While this information could be interpreted as indicating that SPX had complied with mandatory requirement No. 5, it was not entirely clear.
32. PWGSC requested clarification from SPX¹⁴ concerning mandatory requirement No. 5. In response, SPX provided PWGSC with a letter from the manufacturer¹⁵ of the MP5000. After receiving this clarification, PWGSC concluded that SPX met mandatory requirement No. 5 on page 6 of the RFP.
33. In the Tribunal's view, SPX's response constitutes a *bona fide* clarification of an ambiguity in its bid rather than a substantive change to its bid. Consequently, the Tribunal agrees with PWGSC's position that it was entitled to take this information into account for purposes of bid evaluation, rather than rejecting it as an attempt at "bid repair".
34. Taking into account the information in SPX's bid and in SPX's clarification of its bid, the Tribunal does not consider that PWGSC evaluated mandatory requirement No. 5 improperly.

12. GIR, Confidential Exhibit 3.

13. Confidential documentation, submitted April 16, 2004, by PWGSC.

14. GIR, Confidential Exhibit 2.

15. GIR, Confidential Exhibit 4.

35. The Tribunal notes that the product specification submitted by Bosik as part of its complaint was not part of SPX's proposal or its clarification and was therefore not part of the information that would appropriately be considered by the evaluators who reviewed the proposal.

36. Accordingly, the Tribunal finds that the complaint is not valid and awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Bosik.

COST ISSUES

37. In its submission, SPX contended that, acting prudently, it had elected to participate in all phases of the proceedings and had incurred considerable expense in so doing. It therefore requested the Tribunal to award the costs that it actually incurred and to direct Bosik or, in the alternative, the Government of Canada, to pay them. The Tribunal has discretion, under section 30.16 of the *CITT Act*, to award costs to or against interveners. The Tribunal is required to exercise its discretion in awarding costs and to follow the same principles as those that are applied by the courts.¹⁶

38. The jurisprudence of the Federal Court of Canada¹⁷ (the Court) indicates that costs are awarded only infrequently to or against interveners because of the high threshold that must be met before being eligible or liable for costs. In one case, where an intervention was successful, the Court nevertheless held that the interveners were entitled to no costs since their participation was completely voluntary.¹⁸ In other cases, costs were limited to issues that the interveners raised, but which neither of the other parties wished to raise.¹⁹ Only in one case of which the Tribunal is aware was the intervener successful in obtaining a right to complete costs, and that was in a case where it had no choice but to become a party to the proceedings, due to the possibility of the proceedings resulting in an injunction against it.²⁰

39. Applying these considerations to SPX's request, the Tribunal is of the view that SPX should not be awarded costs in these proceedings. Although SPX alluded to the uncomfortable position of a successful bidder in a procurement complaint, by its own words, it acknowledged that it "elected" to intervene so as to be "acting prudently". This is in contrast to *Glaxo*, where the Court found that the intervener had "no choice" but to join the proceedings. Moreover, SPX's intervention brought no new significant substantive issues to the proceedings. It offered a measure of support for PWGSC's position in the GIR, but the bulk of its submission dealt with its eligibility for costs. The Tribunal recognizes that SPX's commercial interest in the proceedings was significant and considers that its submission was helpful. However, the Tribunal does not consider that the relevant judicial principles would support an award of costs to SPX in this case.

40. In determining the amount of the cost award in this complaint, the Tribunal has considered its *Guideline*. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Appendix A of the *Guideline* (Level 1). The

16. *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199.

17. For convenience, the Tribunal has used the term "Federal Court of Canada" to collectively refer to what is now known as the two federal courts, i.e. the Federal Court and the Federal Court of Appeal. At the time of the jurisprudence referred to here, the term "Federal Court of Canada" referred to what were then the two divisions of the Court.

18. *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158 (T.D.).

19. *C.J.A. v. University of Calgary*, [1986] F.C.J. No. 464 (F.C.A.); *Florence v. Canada (Air Transport Committee)*, [1991] 2 F.C. D-32 (T.D.).

20. *Glaxo Canada v. Canada (Minister of National Health and Welfare)* (1988), 19 C.P.R. (3d) 374 (F.C.T.D.) [*Glaxo*].

Guideline contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was quite low, in that the goods were simply defined, although the procurement did involve installation of the goods and some consideration of basic engineering parameters. The complexity of the complaint was low, in that it involved a single, simple issue (whether PWGSC awarded the contract to a bidder whose proposal did not meet the mandatory requirements of the RFP) and a single aspect of the applicable trade agreements. Finally, the complexity of the complaint proceedings was quite low, as there was a single intervener, there were no motions, no public hearing was held, and the complaint was resolved within the 45-day “express option” time frame. Accordingly, as contemplated by the *Guideline*, the Tribunal’s preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

41. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

42. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Bosik. The Tribunal’s preliminary indication of the level of complexity for this complaint case is Level 1 and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member