



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2003-077

StenoTran Services Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, June 28, 2004*

*Corrigendum issued
Friday, July 2, 2004*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS 1

 COMPLAINT 1

 PROCUREMENT PROCESS..... 1

 POSITIONS OF THE PARTIES3

 PWGSC’s Position 3

 StenoTran’s Position.....4

 TRIBUNAL’S DECISION.....5

 DETERMINATION OF THE TRIBUNAL7

CORRIGENDUM.....8

IN THE MATTER OF a complaint filed by StenoTran Services Inc. 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

STENOTRAN SERVICES INC.

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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that all original proposals submitted to the Department of Public Works and Government Services be re-evaluated on the basis of the evaluation procedures and criteria outlined in the Request for Proposal, as amended. Particularly, the Canadian International Trade Tribunal recommends that the test CDs submitted by the bidders be compared to the exact original hard copy documents that were sent with the bid packages. Should this re-evaluation indicate a result that is different from the first evaluation, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the contract awarded to ASAP Reporting Services Inc. and award the contract to the winning bidder. Should this re-evaluation indicate that no bidder submitted a compliant proposal, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services cancel the contract with ASAP Reporting Services Inc. and re-start the procurement.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Tribunal Member: Richard Lafontaine, Presiding Member

Investigation Officer: Michael W. Morden

Counsel for the Tribunal: Marie-France Dagenais

Complainant: StenoTran Services Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke
Christianne M. Laizner
Ian McLeod

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On February 11, 2004, StenoTran Services Inc. (StenoTran) 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. 5M000-03C037/A) by the Department of Public Works and Government Services (PWGSC), on behalf of the Canadian Human Rights Tribunal (CHRT), for court reporting services in pay equity cases.

2. StenoTran alleged that the CHRT and PWGSC improperly evaluated its proposal by using an unfair evaluation process and demonstrated preferential treatment toward the winning company, ASAP Reporting Services Inc. (ASAP). More specifically, StenoTran alleged that the Request for Proposal (RFP) had a poorly defined standard regarding the production of “exact images”, the criterion upon which it was disqualified. It also alleged that neither it nor any other bidder, including ASAP, could meet this standard, if all proposals were evaluated consistently and in accordance with the RFP. Moreover, StenoTran submitted that the inclusion of scanning and optical character recognition (OCR) services as mandatory requirements for court reporting services in pay equity cases and not in non-pay equity cases appeared questionable.

3. StenoTran requested, as a remedy, that it be awarded costs for lost profit or lost opportunity for having been denied the opportunity to perform the contract.

4. On March 15, 2004, PWGSC filed a Government Institution Report (GIR) with the Tribunal. StenoTran filed its comments on the GIR on March 25, 2004. On April 15, 2004, the Tribunal requested additional information from PWGSC regarding elements of the bidding and evaluation process. PWGSC provided the requested information on April 21, 2004, and StenoTran provided its comments on these responses on April 28, 2004.

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

PROCUREMENT PROCESS

6. An RFP was issued by PWGSC, on behalf of the CHRT, on October 31, 2003, with a closing date of November 27, 2003. There were two amendments and a number of attachments to the RFP providing Questions and Answers. The bid closing date was extended to December 12, 2003.

7. With respect to information that bidders were required to submit with their proposals, Part 2 of the RFP contained the following provisions:

4.0 EVALUATION PROCEDURES

Proposals will be evaluated in accordance with the Evaluation Procedures and Criteria specified in **Annex “C”**. Proposals received will be assessed against the evaluation criteria identified therein for the total requirement of this Request for Proposal (RFP) and in conjunction with the accompanying Statement of Work, **Annex “A”**.

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

8. Section C.2 of Annex “C”, “Evaluation Procedures & Criteria” provides, in part, as follows:

5. Each bidder requesting a bidding package will be provided with a sample transcript and related exhibits (Annex “F” –Sample Transcript and Related Exhibits). . .

The transcript is to be reproduced in exact accordance with the format set out in paragraph 6(h) of the Statement of Work in this solicitation and submitted with the CD in PDF format in exact accordance with paragraph 6(i) of the [Statement of Work]. . .

The CD submitted must have the following characteristics:

- Exhibits are to be scanned and OCR'd and available on the CD in PDF format.

. . .

The contents of the test CD will be evaluated as follows:

It meets the criteria outlined in Annex “A”, paragraph 6(h) & (i)

The quality of the reproduction of the scanned exhibits will be assessed in relation to the originals.

. . .

Evaluations will be carried out by CHRT personnel.

9. Paragraph 6(i) of Annex “A” provides, in part, the following:

- i) CD's to conform to the following specifications for the pay equity hearings in current use:

- All transcripts must be in PDF format, fully text indexed and searchable. . .
- All Transcripts and Exhibits to be exact images of the originals

. . .

- Structure of [CDs] to be determined by the Tribunal but will adhere to the following basic structure:

- D:\ transcripts

- D:\ exhibits

- D:\ Index

10. Amendment No. 2 to the RFP, dated November 27, 2003, provided, in part, the following:

REASON FOR AMENDMENT:

1. To amend Annex A, Statement of Work;
2. To amend Annex B, Basis of Payment; and
3. To respond to questions that were asked.

Q.12 This question refers to page 31, 5M000-03C037/A, the statement “The quality of the [reproduction] of the scanned exhibits will be assessed in relation to the originals.” Am I right in my understanding that [“originals”] in this instance refers to the exact documents sent to us in what is referred to as the “bid package”?

A.12 That is correct.

[ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED]

11. Six proposals were received, including two from StenoTran, two from a StenoTran-related company and two others, including one from ASAP.

12. PWGSC determined that ASAP had submitted the winning proposal and, on January 12, 2004, it awarded the contract to ASAP and informed the other potential suppliers of the results. On January 12, 2004, StenoTran requested a debriefing, which took place on January 22, 2004. Between January 12 and 22, 2004, there were a number of e-mails between StenoTran and PWGSC relating to the reasons for StenoTran's disqualification. Subsequent to the debriefing, PWGSC, acting on StenoTran's request, reviewed pertinent solicitation facts and, via e-mail dated February 2, 2004, confirmed to StenoTran that it stood by its initial assessment—that StenoTran had not produced an "exact image", as required by the RFP, and that the evaluation had been done in a fair and equitable manner.

13. StenoTran filed its complaint with the Tribunal on February 11, 2004.

POSITIONS OF THE PARTIES

PWGSC's Position

14. Regarding the allegation that StenoTran's proposal was unfairly evaluated and that it did, in fact, meet a reasonable "exact image" standard, PWGSC submitted that the discrepancies between the original sample documentation and the reproduced documents on StenoTran's CD are readily apparent in a side-by-side, on-screen comparison. It submitted that, regarding StenoTran's test CD, the evaluators noted the following: blue text instead of black; an alteration in background colour; an occasional change in font size; and headers and footers that were so faint that they were unreadable. PWGSC submitted that, more importantly, StenoTran admitted in its complaint² that its test CD was not an exact image of the original documents. It submitted that, despite StenoTran's arguments to the contrary, it was possible for the winning company to produce an exact image.

15. PWGSC noted that StenoTran also alleged that there was no measurable standard set in the RFP for image quality and that this standard should have been properly defined. It submitted that the RFP clearly stated that "[t]he quality of the reproduction of the scanned exhibits [would] be assessed in relation to the originals." It submitted that the evaluation of all test CDs was conducted in accordance with this standard.

16. PWGSC also submitted that the time for complaints about the exact image standard or the methodology for evaluating the exact image criterion had expired. It submitted that complaints regarding any aspect of the RFP requirements ought to have been raised during the bidding period and before bid closing. It submitted that it is not possible for complainants to adopt a wait-and-see attitude and only make a challenge once the procurement process is over.³

17. Regarding the second aspect of the complaint, PWGSC submitted that StenoTran's allegations of improper behaviour on the part of CHRT officials were unfounded and that the majority of the allegations related to a 2001 solicitation and its subsequent contract. It submitted that the bidding strategy and linguistic capability of resources proposed in response to the 2001 solicitation, as well as business decisions made by the CHRT during the period of the contract, are untimely. It also submitted that there is no basis to any of the allegations that CHRT officials engaged in preferential treatment toward ASAP to the detriment of StenoTran.

2. At 9.

3. *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd. and Minister of Public Works and Government Services and Attorney General of Canada v. Hewlett-Packard (Canada) Ltd. and IBM Canada Ltd.* (2002 FCA 284).

18. PWGSC submitted that the only allegation regarding improper behaviour relating to the current solicitation, concerning the decision to include both scanning and OCR in the same solicitation, is also untimely. PWGSC submitted that any complaint relating to the structure of the RFP had to have been made prior to bid closing and well before the current complaint was submitted. PWGSC also submitted that, in addition to there being no merit to the allegation, the Tribunal has no jurisdiction to consider whether it was unfair to bidders that the requirements for court reporting and the requirements for OCR and scanning were tendered in the same solicitation.

19. In response to the questions asked by the Tribunal about elements of the bidding and evaluation process, PWGSC submitted that the CHRT printed out two of the documents⁴ in question in-house and had a local company print the remaining two exhibits.⁵ The two sets of documents were assembled into bidder's packages by CHRT staff and sent to PWGSC, which distributed the packages randomly to the bidders. PWGSC submitted that the CHRT categorically stated that no bidder had access to the electronic versions of its original documents and that, in fact, the documents were carefully prepared by CHRT officials by making some very obvious and some very subtle changes to ensure that no bidder could attempt to download the electronic versions of Exhibits T-1 and T-2 from its Web site. PWGSC confirmed that the evaluators compared the bidders' test CDs to electronic versions of the documents and that the electronic versions used for comparison purposes had been provided as Exhibit 18 of the GIR. PWGSC submitted that, for control purposes only, the CHRT evaluators had printed out a hard copy of the test CDs to compare them with the original CHRT hard copy.

20. In conclusion, PWGSC submitted that the complaint was without merit and ought to be dismissed, and that costs should be awarded to the Crown.

StenoTran's Position

21. StenoTran submitted that, if the test CDs had been evaluated as described by PWGSC, then it would have been impossible for any company to have produced a test CD that contained images that were exactly like Exhibit 18, because the bid package documents did not match Exhibit 18. It submitted that the colour variations between the bid package and Exhibit 18 are readily apparent. In addition, it submitted that the RFP provided that the test CDs were going to be "assessed in relation to the originals" and that Question and Answer 12, incorporated into the RFP in amendment No. 2, confirmed that the "originals" were the hard copy documents provided as the bid package, not electronic versions of them. StenoTran submitted that the scanned images contained on its test CD more closely resemble the bid package than Exhibit 18 does.

22. StenoTran submitted that there was no standard given to measure the "exact image" mandatory requirement and that there should have been.

23. StenoTran submitted that its test CD contained "exact" readable text, had "exact" numbers of pages, scored "exactly" 100 percent in OCR searchability, contained pictures of commissioners that one could easily identify in a crowd, had links that redirected the user to the "exact" destination, and so on. Using those measures as a standard, StenoTran submitted that a practical and common sense opinion on such a document would find that the document was, in fact, exact. StenoTran argued that, in accordance with the maxim "*verba fortius accipiuntur contra proferentem*" (words are to be taken most strongly against him

4. Exhibit T-3 and the sample transcript.

5. Exhibits T-1 (CHRT's 2002 Annual Report in English) and T-2 (CHRT's 2002 Annual Report in French).

who uses them),⁶ its definition of exact must supersede PWGSC's and the CHRT's interpretation of "exact".

StenoTran submitted that, due to its incumbency, ASAP would have unique knowledge of what the CHRT would consider relevant and irrelevant when submitting scanned exhibits. StenoTran submitted that this means that ASAP is the *de facto* standard-setting organization for the scanning of CHRT documents and that, unless ASAP actually met the expressly stated standard of "exact image" *in omnibus* (on all points),⁷ then it stands to reason that the evaluation team must have evaluated all bidders' test CDs using the ASAP *de facto* standard. This, StenoTran submitted, demonstrated systematic preferential treatment toward ASAP regarding this solicitation.

TRIBUNAL'S DECISION

24. 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁸ further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements.

25. Article 506(6) of the *Agreement on Internal Trade*⁹ 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.

26. StenoTran alleges that its proposals were unfairly evaluated and that preferential treatment was accorded to one of the bidders.

27. Paragraph 6(i) of Annex "A" to the RFP indicates that all transcripts and exhibits used in pay equity hearings are to be exact images of the originals.

28. Paragraph 5 of Section C.2 of Annex "C" to the RFP stipulates that, for evaluation purposes, the test CDs will meet the criteria set out in paragraph 6(i) of Annex "A" to the RFP and that the quality of the reproduction of the scanned exhibits contained in the test CDs submitted by the bidders will be assessed in relation to the originals.

29. Question 12 and its corresponding answer, incorporated as part of amendment No. 2 to the RFP, read as follows:

Q.12 This question refers to page 31, 5M000-03C037/A, the statement "The quality of the [reproduction] of the scanned exhibits will be assessed in relation to the originals." Am I right in my understanding that ["originals"] in this instance refers to the exact documents sent to us in what is referred to as the "bid package"?

A.12 That is correct.

6. *Black's Law Dictionary*, 5th ed.

7. *Ibid.*

8. S.O.R./93-602.

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

30. In response to one of the Tribunal's clarification questions of April 15, 2004, PWGSC, at paragraph 7 of its letter of April 21, 2004, submitted the following:

The Tribunal's question demonstrates why it was important for evaluation purposes to evaluate the bidders' test CDs as against the CHRT's original CD, and for control purposes only to print out a hard copy from the bidders' test CD to compare with the CHRT original hard copy. . . . [T]he evaluators compared only bidder scanned electronic versions as against the CHRT electronic version. The evaluators did not evaluate the originals of the hard copy documents with the electronic versions of the bids which is the comparison being queried by the Tribunal.

31. Paragraph 7 of PWGSC's letter confirms that the contents of each CD submitted with the proposals were assessed in a side-by-side comparison with the CHRT's original sample transcript and related exhibits in electronic form.¹⁰ The letter further indicates the importance to PWGSC of evaluating "the bidders' test CDs as against the CHRT's original CD". In light of the foregoing, the Tribunal finds that the evaluators did not assess the test CDs against the original documents submitted to the potential bidders in the bid packages, as clarified by question and answer 12 in amendment No. 2 to the RFP noted above. They compared the bidders' scanned electronic versions against the CHRT's electronic version. Amendment No. 2 required that the test CDs be assessed against the exact documents sent to the bidders in the "bid package". In this connection, the Tribunal agrees with StenoTran that Exhibit 18 of the GIR (i.e. the CHRT's original documents in electronic form used for comparison purposes) is not an exact match with the hard copy of the documents provided to bidders for the purpose of scanning. Moreover, according to paragraph 22 of the Facts section of the GIR, as a control measure only, the two CHRT evaluators printed a sample from the test CDs and compared this printed document to the CHRT's original hard copy sample transcript and related documents. The Tribunal finds that this procedure was not contemplated by the evaluation methodology contained in the RFP, as amended.

32. The Tribunal, therefore, finds that PWGSC and the CHRT did not follow the mandatory evaluation requirements outlined in the RFP and that, consequently, they were in breach of Article 506(6) of the *AIT*.

33. With respect to the allegations that there was preferential treatment by the CHRT toward one supplier, the Tribunal is not convinced that the facts of this case, in and of themselves, support any finding of preferential treatment, notwithstanding the allegations relating to previous and pending procurements.

34. With respect to StenoTran's allegation that the RFP contained no measurable standard by which to evaluate the proposals, the Tribunal is of the view that this ground of complaint is out of time as the absence of such a standard was known or should have been known more than 10 working days before the complaint was filed with the Tribunal. Hence, the latest that a complaint or objection could have been filed by StenoTran in relation to this ground would have been 10 working days after the day on which the bids had to be submitted to PWGSC, in other words, by December 30, 2003. This date is calculated with the assumption that StenoTran first read the RFP on the date upon which the proposals were due to be submitted, i.e. December 12, 2003. The complaint was not filed until February 11, 2004.

35. Accordingly, the Tribunal finds the complaint to be valid in part.

36. In determining the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement, as set out in subsection 30.15(3) of the *CITT Act*. This includes taking into account the seriousness of any deficiency in the procurement process, the degree to which StenoTran was prejudiced,

10. At paragraph 6 of the same letter, PWGSC reports that CHRT officials stated that no bidder had access to the electronic version of the CHRT electronic documents.

the degree to which the integrity and efficiency of the competitive procurement system were prejudiced, whether the parties acted in good faith and the extent to which the contract was performed.

37. In light of all the above, the Tribunal finds that there was a serious deficiency in the manner in which this procurement was handled. It is also of the view that, as a result, the integrity and efficiency of the procurement system were materially prejudiced. Accordingly, the Tribunal recommends that PWGSC re-evaluate the proposals submitted in response to the designated solicitation, as outlined below in the Tribunal's determination.

38. Given that the complaint is only valid in part, the Tribunal is of the view that each party should assume its own costs in this matter.

DETERMINATION OF THE TRIBUNAL

39. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

40. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that all original proposals submitted to PWGSC be re-evaluated on the basis of the evaluation procedures and criteria outlined in the RFP, as amended. Particularly, the Tribunal recommends that the test CDs submitted by the bidders be compared to the exact original hard copy documents that were sent with the bid packages. Should this re-evaluation indicate a result that is different from the first evaluation, the Tribunal recommends that PWGSC cancel the contract awarded to ASAP and award the contract to the winning bidder. Should this re-evaluation indicate that no bidder submitted a compliant proposal, the Tribunal recommends that PWGSC cancel the contract with ASAP and re-start the procurement.

Richard Lafontaine
Richard Lafontaine
Presiding Member

IN THE MATTER OF a complaint filed by StenoTran Services Inc. 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

STENOTRAN SERVICES INC.

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

CORRIGENDUM

The first paragraph of the determination should read: “Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid in part.”

By order of the Tribunal,

Hélène Nadeau
Secretary