



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-054

Envoy Relocation Services

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, May 16, 2005*

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IN THE MATTER OF a complaint filed by Envoy Relocation Services 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

ENVOY RELOCATION SERVICES

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 the Department of Public Works and Government Services, within 15 working days of the publication of this determination, re-evaluate the responses to section 2.2.4.2 of Annex "D" to the Request for Proposal with regard to all bidders, with a new evaluation team, evaluating each proposal from each bidder individually and separately. If this re-evaluation results in a new winning bidder for either contract, or both, the existing contract should be cancelled and awarded to that bidder.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Envoy Relocation Services its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. 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 the *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

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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| Intervener: | Royal LePage Relocation Services Limited |
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STATEMENT OF REASONS

COMPLAINT

1. On February 18, 2005, Envoy Relocation Services (Envoy) 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. 24062-030147/C) by the Department of Public Works and Government Services (PWGSC), on behalf of the Treasury Board of Canada Secretariat (for the Government of Canada [GOC]), the Royal Canadian Mounted Police (RCMP) and the Canadian Forces (CF) for services relating to the relocation of employees. The solicitation, which called for a separate proposal for each of the three specified government groups, resulted in two contracts being awarded to Royal LePage Relocation Services Limited (Royal LePage)—a joint one for the GOC and the RCMP requirements and a separate one for the CF requirement.

2. Envoy alleged that PWGSC improperly evaluated its proposals and also breached a duty of confidence, thereby removing a competitive advantage that Envoy ought to have had. Specifically, it alleged that PWGSC improperly compared Envoy's proposals against each other, resulting in a significant downgrading of its technical scores; did not award Envoy points in several categories for which it should have received points; and disclosed to a competitor Envoy's pricing information from a previous, related solicitation. Envoy submitted that the combined effect of these errors was to deny it at least one contract (the CF contract), which it believes that it ought to have won.

3. Envoy submitted that, as there had already been two solicitations for these services for which it had incurred substantial bidding costs, it was not going to request a re-tendering of the requirement. Instead, it requested that it be compensated for lost profits and reimbursed for the costs that it incurred in preparing its bid and proceeding with the complaint to the Tribunal. Envoy requested that, due to the complexity and importance of the issues involved, any costs relating to bringing the complaint to the Tribunal be considered at a rate higher than those prescribed in the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*).

4. On February 28, 2005, 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*.² The complaint was accepted for inquiry on only the first ground noted above, specifically, that PWGSC improperly compared Envoy's three proposals against each other. With respect to the third ground of complaint, the Tribunal was of the opinion that the complaint did not contain information that provided a reasonable indication that PWGSC had improperly disclosed pricing information to any party. With respect to the second ground of complaint, the Tribunal noted that it does not normally substitute its judgement for that of the evaluators unless there is evidence that the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria, or have otherwise failed to behave in a procedurally correct manner. The Tribunal was of the opinion that the information in the complaint did not provide a reasonable indication that this had been the case.

5. On March 9, 2005, the Tribunal granted Royal LePage intervener status. On March 29, 2005, PWGSC submitted a Government Institution Report (GIR) to the Tribunal. On April 8, 2005, Envoy and

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

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

Royal LePage submitted their respective comments on the GIR. On April 19, 2005, PWGSC filed a response to Envoy's comments on the GIR, stating that Envoy had submitted new information regarding the complaint. The Tribunal accepted PWGSC's response and entered it on the record and, on April 22, 2005, Envoy submitted its reply to PWGSC's submission.

6. 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, pursuant to paragraph 25(c) of the *Canadian International Trade Tribunal Rules*,³ disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

7. The Request for Proposal (RFP) was posted on MERX⁴ on April 20, 2004, with a closing date for the receipt of bids of May 31, 2004, which was subsequently extended to June 14, 2004.

8. The RFP provided for two contracts to be awarded—a joint one for the GOC and the RCMP requirements and a separate one for the CF requirement. Three proposals were required: one for the GOC, one for the RCMP and one for the CF. Bidders were allowed to bid on the CF requirement only, the GOC and the RCMP requirements only, or all three.

9. According to PWGSC, 10 proposals were received from four firms, including Envoy, which submitted proposals for all three requirements. The evaluation of the technical proposals was conducted from June 16 to July 1, 2004, under the observation of a fairness monitor. On November 2, 2004, PWGSC announced the award of both contracts to Royal LePage.

10. On November 2, 2004, PWGSC notified Envoy that it had not been issued a contract and provided it with the technical scores, total bid price and method of selection results for its proposals and those of the winning bidder. On November 11, 2004, Envoy wrote to PWGSC, objecting to the results, requesting a debriefing and submitting written questions. PWGSC responded in writing on November 30, 2004. A debriefing was held on December 3, 2004, at which PWGSC provided Envoy with the rationale for the points awarded to Envoy's proposal, as well as written responses to questions that Envoy had sent by e-mail earlier that day. Envoy raised further issues with PWGSC in a letter dated December 20, 2004, to which PWGSC responded, in writing, on February 4, 2005.

11. Envoy submitted its complaint to the Tribunal on February 18, 2005.

POSITIONS OF THE PARTIES

PWGSC's Position

12. PWGSC submitted that the alleged breach involved the evaluation of a single criterion in Annex "D" to the RFP, which provided as follows:

2.2.4.2 Staffing (80 points)

The Bidder shall provide a detailed plan, which demonstrates and explains how it will recruit and engage sufficient qualified human resources necessary to deliver the services identified in the Statement of work as of 01 December 2004.

3. S.O.R./91-499.

4. Canada's electronic tendering service.

| Staffing (80 Points) | Totally Unsatisfactory 0% | Unsatisfactory 40% | Meets Most 70% | Meets 100% |
|--|--|-------------------------------|-------------------------------|-----------------------|
| Detailed Plan which demonstrates and explains how it will recruit and engage sufficient human resources necessary to deliver the services as of 01 Dec 2004 (80 points) | | | | |
| Totals | | | | /80 |

13. PWGSC submitted that Envoy had overstated the significance of the sole alleged breach upon which the Tribunal decided to conduct its inquiry. It submitted that the only criterion to be investigated was worth 80 out of 1,000 points. Given a hypothetical circumstance in which Envoy was to gain back the points that it claimed to have lost due to the alleged breach, PWGSC argued that this would not be sufficient to affect the outcome of the bid evaluation and that Royal LePage would still be considered the winning bidder, albeit with a smaller margin of victory.

14. PWGSC also submitted that part 4 of the evaluation directive used by the evaluation team during the evaluation process clearly intends that the technical proposal of each bidder be evaluated separately from the technical proposals of other bidders, not that each technical proposal of a given bidder be evaluated separately from the other technical proposals of that same bidder. It claimed that at no time during the evaluation phase was Envoy's, or any other company's, proposal compared with a proposal from a different company.

15. PWGSC submitted that there is nothing in the evaluation directive that ought to be interpreted as prohibiting evaluators from taking into account clear, readily apparent discrepancies between the proposals of an individual bidder. It submitted that, during the review of Envoy's three proposals, one of the evaluators, in the exercise of her due diligence and in the context of her proposal-by-proposal evaluation of Envoy's bids, identified significant discrepancies that were "readily apparent" among Envoy's proposals in regard to this criterion. PWGSC submitted that it was necessary and appropriate for the information discrepancies to be addressed in the technical scoring (i.e. with a lower than perfect score) due to Envoy's failure to demonstrate that it had, or could obtain, sufficiently qualified human resources.

16. PWGSC also submitted that, while the RFP provided a mechanism for it to seek clarifications, it only allowed PWGSC to do so under the appropriate circumstances. Section 4.0 of Part 2 of the RFP reads in part as follows:

The evaluation team reserves the right but is not obliged to perform any of the following:

a) seek clarification or verify any or all information provided by the Bidder with respect to this RFP.

17. In this case, PWGSC submitted that it was not appropriate to seek clarification because the clarification process is only to be used to explain an existing aspect of a proposal, not as an opportunity to modify or revise that proposal. It submitted that, in this case, the conflict in information could only have been resolved through changes to one or more of the proposals and that such changes would constitute "bid repair", which is not permitted.

18. PWGSC submitted that the complaint should therefore be dismissed and that it should be awarded its costs for responding to the complaint.

Royal LePage's Position

19. Royal LePage submitted that it fully supported the submissions set out in the GIR. In particular, it supported the position that the evaluation process was conducted in accordance with the relevant provisions of the *Agreement on Internal Trade*,⁵ the sole trade agreement that applies to this solicitation.

Envoy's Position

20. Envoy submitted that PWGSC essentially acknowledged that a comparative evaluation of its three proposals took place, which is contrary to section D.1 of Annex "D" to the RFP, which states as follows: "Each proposal will be evaluated separately." It submitted that this section clearly does not have the narrow meaning that PWGSC argued for in the GIR. Envoy submitted that it goes without saying that one bidder's proposals would not be compared to another bidder's proposals. It argued that the RFP provision clearly stated that the bidders must submit three separate proposals and that they would each be evaluated separately as stand-alone submissions.

21. Envoy also submitted that the Fairness Monitor Report included evidence that demonstrated that the proper evaluation procedures were not followed. According to Envoy, the report described two different procedures used by PWGSC when evaluating the respective Envoy and Royal LePage proposal packages. Envoy submitted that the report provided that the evaluators followed the proper procedures when evaluating the Royal LePage proposals, namely, that the evaluation of the mandatory and rated criteria for each individual proposal was completed before the evaluation of the next Royal LePage proposal commenced. This is in contrast to the manner in which the report indicated that PWGSC evaluated the Envoy proposals—all three proposals were being evaluated at the same time over a period of several days.

22. Envoy submitted that the two contracts resulting from the solicitation were going to be significantly different and that, accordingly, it structured its proposals to reflect these differences. It submitted that the CF requirement is the largest relocation management contract in Canada, for a single client with a heavy volume of moves concentrated during the CF posting season. The GOC and RCMP requirement, on the other hand, concerns in excess of 40 client departments and moves spread more evenly throughout the year. Given these differences, Envoy submitted that PWGSC should have expected to find differences between the proposals and that these differences should not have led to lower scores, but should have demonstrated that Envoy had a sophisticated understanding of the particular requirements of each contract, which conceivably could have led to its receiving higher scores.

23. Envoy also submitted that PWGSC could have requested clarifications from Envoy on the differences between its proposals, but chose not to do so. It submitted that PWGSC argued erroneously that the perceived discrepancies could only be answered in a fashion that would constitute bid repair. Envoy submitted that PWGSC assumed that Envoy would have to change its proposals and failed to allow for the fact that Envoy's response would have been that there were no discrepancies because the proposals reflected exactly what Envoy intended to submit for each requirement. Envoy submitted however that it was not afforded the opportunity to indicate this.

24. Envoy submitted that it did not receive what it was entitled to, namely, to have all of its proposals evaluated wholly in accordance with the procedures set out in the RFP. It submitted that PWGSC's failure

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

to follow the prescribed evaluation procedures cannot now be excused by arguing that the consequences to Envoy of such a failure were inconsequential.

TRIBUNAL'S ANALYSIS

25. 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 agreement, which, in this case, is the *AIT*.⁶

26. 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 the bids and the methods of weighting and evaluating the criteria.

27. Thus, the issue is whether PWGSC evaluated the bids in accordance with the evaluation criteria set forth in the RFP.

28. With respect to the issue of comparing a bidder's proposals, Annex "D" to the RFP provided in part:

D.1 EVALUATION PROCEDURES

(c) . . . Three separate proposals are required: one proposal for CF, one proposal for GOC and one proposal for RCMP. Each proposal will be evaluated separately.

29. It is uncontested that PWGSC did compare the three Envoy proposals against one another in evaluating section 2.2.4.2 of Annex "D" to the RFP. It is also uncontested that PWGSC, as a result, deducted points from all of Envoy's proposals because some of the personnel resources in the CF proposal were given different titles and responsibilities than in the GOC and RCMP proposals. Envoy alleged that, in performing this comparison, PWGSC breached its obligations under the *AIT* by not evaluating the proposals in the manner prescribed in the RFP. PWGSC argued, on the other hand, that the words of the RFP are to be interpreted as meaning that the proposals of one bidder will not be compared with the proposals of another bidder and that it has a responsibility to investigate readily apparent discrepancies contained in proposals as part of the due diligence that it must exercise when it conducts bid evaluations.

30. In this case, the Tribunal is of the view that the relevant terms of the RFP should be interpreted as Envoy has interpreted them—that all proposals, regardless of which bidder submitted them, are to be evaluated individually and separately. In other words, each of Envoy's three proposals was to be evaluated independently of Envoy's other two proposals. The Tribunal notes that the positioning of the statement "Each proposal will be evaluated separately", as contained in section D.1 of Annex "D" to the RFP, immediately follows the description of how many proposals the bidder is to submit. The Tribunal therefore believes that it is correct, on the basis of ordinary language usage, to understand this as meaning that the separateness of the evaluations refers to each individual proposal submitted by each bidder and not, as is argued by PWGSC, simply to the proposals of each bidder in relation to those of other bidders.

6. Relocation services are not subject to the *North American Free Trade Agreement* (Annex 1001.1b-2) nor to the *Agreement on Government Procurement* (Annex 4 to Canada's Appendix 1, which lists the services that Canada is offering for coverage, does not include relocation services).

31. As indicated by PWGSC, it had the right, under section 4.0 of Part 2 of the RFP, to “verify any or all information provided by the Bidder with respect to [the] RFP”. Any verification by PWGSC was required to be done in a way that complied with the overall evaluation procedures set by the RFP. Section D.1 of Annex “D” to the RFP required PWGSC to evaluate Envoy’s proposals independently, and the right to verify was required to be exercised in a way that did not conflict with this requirement. In this instance, it is the Tribunal’s view that the question of whether to exercise the right to verify information would not have arisen if the evaluation had complied with the terms of the RFP. The Tribunal will therefore give no further consideration to this argument.

32. Regarding PWGSC’s reference to the evaluation directive to support its interpretation of the applicable evaluation procedures, the Tribunal notes that the evaluation directive did not form part of the tender documents and was not given to bidders prior to bid closing. Consequently, the evaluation directive does not play a role in setting the evaluation criteria as contemplated by Article 506 of the *AIT*.

33. In recommending a remedy, the Tribunal must consider all the circumstances relevant to the procurement, which include the seriousness of the deficiency in the procurement process; the degree to which the complainant and all other interested parties were prejudiced; the degree to which the integrity and efficiency of the competitive procurement system was prejudiced; and whether or not the parties acted in good faith.

34. In this case, although the evidence does not indicate a lack of good faith, a serious breach of evaluation procedures did occur, and the consequences of that breach potentially affected the award of two contracts, thus potentially prejudicing all parties involved in the solicitation. PWGSC, through the drafting of the Statement of Work and the selection of the specific clauses of the RFP, is able to determine the detailed rules that govern each procurement process beyond the general contracting framework established by the trade agreements. When it does not follow its own rules, it prejudices the integrity of government procurement as a whole.

35. The Tribunal therefore recommends, as a remedy, that PWGSC re-evaluate the responses to section 2.2.4.2 of Annex “D” to the RFP with regard to all bidders, with a new evaluation team, evaluating each proposal from each bidder individually and separately. If this re-evaluation results in a winning bidder other than Royal LePage for either contract, then that contract with Royal LePage should be cancelled and awarded to the new winning bidder.

36. The Tribunal does not grant Envoy’s request for costs relating to the preparation of its proposals. In recommending the above remedy, the Tribunal’s objective is to put Envoy in the position where its proposals receive the benefit of the evaluation process that it contemplated when it incurred the costs of preparing its proposals.

37. The Tribunal awards Envoy its reasonable costs incurred in preparing and proceeding with the complaint. Its *Guideline* was drafted in such a manner as to appropriately compensate parties for the work and expense that is involved in proceeding with cases of a wide range of complexity. Although the Tribunal naturally has discretion to award costs at a rate higher than those indicated in the *Guideline*, where appropriate, it does not agree with Envoy’s submission that the complexity and importance of the issues involved should cause it to do so in this instance.

38. The Tribunal is of the view that this complaint case has a complexity level corresponding to the middle level of complexity referred to in Appendix A of the *Guideline* (Level 2). The *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 medium, in that it involved services relating to a defined service project, on an as-required basis, under two related RFPs. The complexity of the complaint was medium, in that it involved an evaluation of a single rated criterion in three separate proposals. Finally, the complexity of the complaint proceedings was medium, as there was a single intervener and one motion, no public hearing was held, and there were some submissions beyond the scope of normal proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

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 PWGSC, within 15 working days of the publication of this determination, re-evaluate the responses to section 2.2.4.2 of Annex "D" to the RFP with regard to all bidders, with a new evaluation team, evaluating each proposal from each bidder individually and separately. If this re-evaluation results in a new winning bidder for either contract, or both, the existing contract should be cancelled and awarded to that bidder.

41. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Envoy its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If either 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

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