



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-017

Radiation Detection Service

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, December 12, 2005*

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IN THE MATTER OF a complaint filed by Radiation Detection Service 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

RADIATION DETECTION SERVICE

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 that the Department of Public Works and Government Services compensate Radiation Detection Service for its lost opportunity by an amount equal to one quarter of the profit that it would reasonably have earned, had it been the successful bidder in Solicitation No. M9010-061087/A. Using Radiation Detection Service's original proposal as a basis, the Canadian International Trade Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Canadian International Trade Tribunal within 30 days of the publication of this determination. Should the parties be unable to agree on the amount of compensation, the parties shall report back to the Canadian International Trade Tribunal separately within the same 30 days, following which the Canadian International Trade Tribunal will issue its final recommendation in this respect.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Radiation Detection Service 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 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Patricia M. Close
Patricia M. Close
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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|---|---|
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STATEMENT OF REASONS

COMPLAINT

1. On September 15, 2005, Radiation Detection Service (RDS) 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. M9010-061087/A) by the Department of Public Works and Government Services (PWGSC) of rectifier power supplies for the Royal Canadian Mounted Police (RCMP).

2. RDS alleged that, in the request for proposal (RFP), PWGSC did not include the criteria for contract award and that PWGSC improperly awarded the contract to a higher-priced bidder. It claimed that it submitted the lowest-priced, technically compliant bid and that it should have been awarded the contract. RDS requested, as a remedy, that the Tribunal award it the contract or its lost profits for having been denied the contract. It also requested that the Tribunal award it its bid preparation costs and the costs that it incurred in bringing the complaint to the Tribunal.

3. On September 22, 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 On October 18, 2005, PWGSC submitted a letter in lieu of the Government Institution Report (GIR) stating that, through inadvertence, certain errors had been made in the procurement process and that it would be appropriate for RDS to be awarded its reasonable complaint costs.

4. On October 25, 2005, RDS submitted its comments on PWGSC's letter.

PROCUREMENT PROCESS

5. The Notice of Proposed Procurement (NPP), with its stated procurement strategy of "Competitive . . . Lowest/Lower Bid . . .", was published on MERX³ on May 30, 2005, and the RFP was issued on June 3, 2005, with a due date for the receipt of bids of July 13, 2005.

6. According to PWGSC, 10 bids were received in response to the RFP, 2 of which were deemed non-responsive at the outset and set aside from further consideration. Of the remaining 8 proposals, PWGSC stated that 4 were found to be technically non-compliant by the evaluators. PWGSC stated that 4 technically compliant proposals had been received, that the proposal submitted by RDS finished fourth and that Ketco Power Products (Ketco) submitted the highest-rated proposal and was awarded the contract.

7. Following the contract award, PWGSC submitted that it had had a number of telephone conversations with RDS and, as a result, had reviewed the solicitation documents and determined that the RFP did not include a contract award provision. It stated that it had informed RDS of this fact on September 9, 2005.

8. On September 15, 2005, RDS filed its complaint with the Tribunal.

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

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

3. Canada's electronic tendering service.

9. 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*,⁴ disposed of the complaint on the basis of the written information on the record.

POSITIONS OF THE PARTIES

PWGSC's Position

10. PWGSC submitted that the RCMP and PWGSC had always intended the basis of contract award to be the highest-rated, technically acceptable bid, although, through inadvertence, there was no such provision in the RFP. PWGSC also noted that, again through inadvertence, the NPP published on MERX stated that the "Procurement Strategy" was "Competitive . . . Lowest/Lower Bid . . ."⁵ PWGSC submitted that its officials were unaware of the errors and proceeded on the basis that the contract was to be awarded to the highest-rated, technically acceptable bid.

11. PWGSC submitted that the highest-rated proposal was the one submitted by Ketco and that RDS was ranked the lowest of the technically compliant proposals. It submitted that, even if the solicitation documents had clearly provided for the lowest-priced, technically compliant bid as the basis for contract award, RDS would not have been awarded the contract. PWGSC submitted consequently that there was no basis for RDS's request for compensation for lost profits.

12. PWGSC submitted that there was a clear error in the procurement process and that RDS is entitled to its reasonable complaint costs. It argued that the complaint was not complicated and that, since it was not disputing the merits of the case, the complaint should be classified at the lowest level (level 1), as described in the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*).

RDS's Position

13. RDS submitted that paragraph 7.4 of the RFP reads as follows:

Only proposals meeting all of the mandatory requirements of the RFP and obtaining a minimum of 42 of the 60 available points shown, will be considered technically acceptable.

14. RDS claimed that its proposal met all the mandatory requirements, obtained 46 out of 60 points and was over \$88,000 cheaper than the winning proposal.

15. RDS noted that, in the letter in lieu of the GIR, PWGSC acknowledged that it had made mistakes in conducting the procurement process; however, RDS disagreed with PWGSC's characterization of these errors as minor. It submitted that these errors were not minor, but rather constituted an omission of an important assessment criterion and the inclusion of a completely misleading assessment factor. RDS submitted that the combined effect of these errors was to skew the entire bidding strategy and that the entire RFP process had been conducted in such an egregious manner that it ensured that RDS had no possibility of submitting a competitive proposal.

16. RDS submitted that it purposely proposed the product that it did because it knew that the product proposed only had to meet the 42-point threshold. It submitted that, if it had been aware that PWGSC's

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

5. Letter in lieu of the GIR, attachment 2.

procurement strategy was for the highest-rated, technically compliant bid, it would have bid a product that matched the exacting standards identified in the requirement. As an example, it noted that its proposal received 0 out of 10 points for the power supply dimensions, which was the result of a risk that it was willing to take, given the content of the published RFP. However, it would not have taken this risk, had the “highest rated, technically compliant” clause been part of the RFP.

17. Accordingly, RDS submitted that it is seeking full compensation for its lost profit, in addition to the costs of preparing its proposal and the complaint.

TRIBUNAL’S ANALYSIS

18. 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*⁶ and the *North American Free Trade Agreement*.⁷

19. Article 506(6) of the *AIT* provides the following: “In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. 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.”

20. Article 1015(4)(d) of *NAFTA* similarly provides that “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”.

21. In other words, the Tribunal must determine whether or not PWGSC followed the contract award methodology specified in the RFP when it awarded the contract to Ketco. The Tribunal cannot find anything in the evidence of the case to indicate that the contract was to be awarded to the highest-rated technical proposal, something that, it notes, PWGSC admitted in the letter in lieu of the GIR. The Tribunal therefore finds that RDS had a reasonable expectation, given the information provided throughout the procurement process, that PWGSC was going to award the contract based on clause 7.4 of the RFP: “Only proposals meeting all of the mandatory requirements of the RFP and obtaining a minimum of 42 of the 60 available points shown, will be considered technically acceptable”, and the NPP’s stated procurement strategy of “Competitive . . . Lowest/Lower Bid . . .” which, in the Tribunal’s view, had to be interpreted by bidders to mean that the contract would be awarded to the lowest bidder. Given these circumstances, the Tribunal finds that PWGSC did not award a contract in the manner specified in the RFP, contrary to Article 1015(4) of *NAFTA*. It further notes that PWGSC clearly acted in breach of Article 506(6) of the *AIT*, which states, as indicated above, that “tender documents shall *clearly* identify the requirements of the procurement, the

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [*AIT*].

7. *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 (entered into force 1 January 1994) [*NAFTA*].

criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria” [emphasis added]. The complaint is therefore valid.

Remedy

22. Having found the complaint to be valid, the Tribunal may now recommend a suitable means of redressing the harm visited upon RDS through the deficiencies in the procurement process. On the one hand, PWGSC has argued that, regardless of which methodology—“highest-rated” or “lowest-priced, technically compliant”—was used to select the winning bid, RDS would not have been declared the winner. On the other hand, RDS claimed that, had it been aware of the proper contract award methodology, it would have proposed another product that more closely matched the requirement.

23. Pursuant to subsection 30.15(2) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC compensate RDS for the opportunity that it lost to participate meaningfully in the procurement process. In recommending the appropriate remedy, it considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3). The Tribunal finds that the violations to the trade agreements, made by PWGSC in this case, represent a serious deficiency, one that has brought the overall integrity of this competitive procurement process into question. It is satisfied that the evidence before it does not demonstrate that there was a lack of good faith on the part of PWGSC, but it is of the view that the deficiency identified in this procurement needs to be addressed by an appropriate remedy. As such, the Tribunal believes that the most appropriate remedy is one that recognizes RDS’s lost opportunity to benefit from this contract. Given that Ketco has already delivered over one third of the contracted goods, the Tribunal does not consider that it would be appropriate to recommend the termination and retender of the contract at this stage. It believes that, had RDS been able to submit a proposal that reflected the contract award methodology used by PWGSC, RDS might have been selected as the winning bidder. Accordingly, RDS was clearly prejudiced by being deprived of the ability to meaningfully compete for this procurement and of the opportunity to be awarded the contract and to profit therefrom. In the circumstances where four bidders were found to be compliant by PWGSC, the Tribunal estimates the opportunity lost by RDS to be one in four and the prejudice that it suffered to be equal to one quarter of the profit that it would have earned, had it been the successful bidder.⁸

24. The Tribunal will also award RDS its reasonable costs incurred in preparing and proceeding with the complaint. It has considered the *Guideline* and is of the view 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 *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 low, in that it involved the supply of a standard, off-the-shelf item. The complexity of the complaint was low, in that the issue was straightforward even though the evaluation contained both mandatory and rated requirements. Finally, the complexity of the complaint proceedings was low for the following reasons: PWGSC, in lieu of a GIR, filed a letter admitting that errors had been made; there were no interveners and no motions; a public hearing was not held; and the 90-day time frame was respected. Accordingly, as contemplated by the *Guideline*, the Tribunal’s preliminary indication of the amount of the cost award is \$1,000. The Tribunal reserves jurisdiction to establish the final amount of the award.

8. *Procurement Compensation Guidelines*.

DETERMINATION OF THE TRIBUNAL

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

26. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC compensate RDS for its lost opportunity by an amount equal to one quarter of the profit that it would reasonably have earned, had it been the successful bidder in Solicitation No. M9010-061087/A. Using RDS's original proposal as a basis, the Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Tribunal within 30 days of the publication of this determination. Should the parties be unable to agree on the amount of compensation, the parties shall report back to the Tribunal separately within the same 30 days, following which the Tribunal will issue its final recommendation in this respect.

27. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards RDS 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 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 the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

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Presiding Member