



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2005-037

Biz-Pro Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Thursday, February 16, 2006*

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IN THE MATTER OF a complaint filed by Biz-Pro 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

BIZ-PRO 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 Biz-Pro 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 in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On November 24, 2005, Biz-Pro Ltd. (Biz-Pro) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. C1111-040784/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Parks Canada Agency (Parks Canada) for the provision of point of sale (POS) devices.

2. Biz-Pro alleged that PWGSC awarded a contract to a supplier whose product does not meet the specifications of the solicitation. Biz-Pro requested, as a remedy, that the Tribunal recommend that PWGSC award the contract to Biz-Pro. In the alternative, it requested that the Tribunal recommend that PWGSC compensate it for its lost profit. Biz-Pro also requested its bid preparation costs and its costs incurred in preparing and proceeding with the complaint. In addition, it requested that the Tribunal order the postponement of the award of any contract in relation to the solicitation until the Tribunal determined the validity of the complaint.

3. On November 30, 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 Tribunal did not issue a postponement of award order in accordance with subsection 30.13(3) of the *CITT Act*, since the evidence on file indicated that a contract had already been awarded. This was confirmed on December 2, 2005, when PWGSC informed the Tribunal that a contract had been awarded to Business Equipment Centres Inc. (Business Equipment).

4. On December 28, 2005, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On January 10, 2006, Biz-Pro filed its comments on the GIR.

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, pursuant to paragraph 25(c) of the *Rules*, disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. According to PWGSC, Solicitation No. C1111-040784/A for the provision of POS devices was published on MERX, Canada's electronic tendering service, on April 20, 2005, and closed May 30, 2005. The Request for Proposal (RFP) set out a number of mandatory requirements with respect to technical specifications and acceptable customer references relating to performance in the field. Those technical requirements designated as mandatory did not include any specifications or criteria relating to the operation of the POS equipment in any particular temperature or precipitation conditions.

7. On May 26, 2005, Biz-Pro questioned PWGSC as to whether the specifications in the RFP had been written with a specific product in mind. On May 27, 2005, PWGSC responded that the specifications

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

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

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

were based on a review of a number of potential POS solutions on the market. On May 30, 2005, bids closed and, according to PWGSC, five proposals, including that of Biz-Pro, were submitted in response to the RFP. Four of the proposals were found to be compliant.

8. PWGSC awarded a contract to Business Equipment on October 7, 2005, and advised Biz-Pro by e-mail of the award. It submitted that Biz-Pro objected that same day to the award of the contract.

9. On November 14, 2005, PWGSC sent a letter to Biz-Pro that explained the results of the evaluation of its bid. On November 16, 2005, PWGSC advised Biz-Pro that the product proposed by Business Equipment was the Vectron POS Mini. Later that day, Biz-Pro filed an objection with PWGSC concerning the operating temperature ranges of the product. In response, PWGSC advised Biz-Pro that the requirement was not considered mandatory. On November 24, 2005, Biz-Pro filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Biz-Pro's Position

10. The overview section of the RFP states the following: "... The POS devices will be used in outdoor locations in temperatures ranging from -35 degrees Celsius to +35 degrees Celsius and in snow and rain. . . ." In amendment No. 001 to the RFP, a question and an answer were published as follows:

...

The RFP states that "The POS devices will be used in outdoor locations in temperatures ranging from -35 degrees Celsius to +35 degrees Celsius and in snow and rain." Please confirm the actual required operating and storage temperature ranges for these devices.

These are the actual operating and storage temperature ranges. While one device may not see these variances, this is the range of conditions across our locations that the POS device may have to endure.

...

11. Biz-Pro submitted that the overview section, as worded in the RFP, described an express and implied need and that the contract had been awarded to a supplier whose product did not meet the expressed needs and requirements. Specifically, it submitted evidence that indicated that the product proposed by the successful supplier had an operating temperature range of 0 to 40 degrees Celsius and a storage temperature of -10 to +50 degrees Celsius. In response to the objection filed by Biz-Pro relating to the non-compliance of the product of the successful supplier, PWGSC, in consultation with its legal advisors, indicated the following: "... The Overview would not be considered a mandatory. If 'Overview' items were to be considered as mandatories, they should have been referred to as mandatory. Since they were not, the presumption would be that these were not intended to be mandatories. . . ."⁴

12. In its comments on the GIR, Biz-Pro submitted that the word "will", as stated in the overview section of the RFP, clearly indicates a specification that must be as closely adhered to as is technically possible by any product available on the market. It further submitted that statements made in the overview section of the RFP cannot be ignored; the operating environment must be considered when evaluating a product for consideration for any proposal and not inadvertently offered from the perspective of a reference. Biz-Pro contended that the operational requirements set forth in the RFP had a big impact on the competitive nature of the proposal and that, had temperature and operational requirements been removed

4. GIR, Exhibit 6.

from the body of the RFP, another less expensive product would have been quoted and other potential suppliers would have offered more competitive quotes.

PWGSC's Position

13. PWGSC submitted that the RFP clearly set out the mandatory physical and operational technical requirements and that all bidders were evaluated with respect to these mandatory requirements on the same basis. It further submitted that the mandatory technical requirements did not include a requirement relating specifically to the operation of a proposed POS device at temperature ranges from -35 to +35 degrees Celsius.

14. PWGSC submitted that, although the overview section of the RFP indicated that the POS devices should be operable indoors and outdoors in varying weather conditions, not all POS devices would be operated in outdoor locations with extreme temperatures and that, for this reason, the operation of a bidder's proposed POS device under outdoor conditions was considered part of the rated evaluation of the bidder's customer references.

15. PWGSC submitted that the requirement to supply one customer reference that included outdoor operations at a point greater than 52 degrees north latitude was directed at addressing the needs of Parks Canada in an environment where outdoor operating conditions, at very cold temperature ranges, would be relevant to the successful operation of a bidder's proposed POS device. Bidders were clearly advised in the RFP that the customer references would be contacted and that the proposed equipment would be evaluated based on the following criteria: its performance in an outdoor environment, the uptime record of the equipment, the number of POS devices in use by the customer reference in the northern latitude, the overall success of the project and the client satisfaction with the product and service.

16. PWGSC submitted that Biz-Pro's proposed equipment does not satisfy the requirement for operation in cold temperatures, as stated in the overview section of the RFP, and that, consequently, even if the information set out in the overview section constituted a mandatory requirement, Biz-Pro's bid would have been deemed non-compliant.

17. Finally, PWGSC requested its costs incurred in responding to 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 instance, are the *Agreement on Internal Trade*⁵ and the *North American Free Trade Agreement*.⁶

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

6. *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].

19. Article 506(6) of the *AIT* provides as follows: “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 1013(1) of *NAFTA* reads as follows:

Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders The documentation shall also include:

. . .

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders

21. The Tribunal finds that, even though the wording of the RFP was somewhat imprecise due to the use of mandatory-like language in the overview section of the RFP, the tender documents did clearly delineate the mandatory requirements for this procurement. In other words, the Tribunal is of the view that the RFP was clear, in that it did not include specific temperature-related requirements for the POS devices under the mandatory requirements section. In reaching this decision, it also took into consideration the issues discussed below.

22. First, the Tribunal notes that PWGSC submitted that it dealt with the temperature requirement through a rated requirement (i.e. requiring that bidders provide at least one reference relating to the use of their equipment at a latitude greater than 52 degrees north) rather than through a mandatory requirement. Although the Tribunal is of the opinion that the use of this rating process involved an indirect assessment based on temperature, it nonetheless cannot find that, on this basis, PWGSC breached a provision of the applicable trade agreements.

23. Second, evidence on the record indicates that Biz-Pro believed that no equipment could meet the requirement. Specifically, Biz-Pro submitted the following in its comments on the GIR: “. . . The Intermec CV60 terminal . . . is the most rugged terminal on the market today, *coming closest to the specifications outlined in the RFP. . . .*” (Emphasis added) The Tribunal notes however that no evidence on the record indicates that Biz-Pro raised the issue of the RFP’s potentially fatal flaw with PWGSC at any time prior to the closing of the bids. In other words, if Biz-Pro had actually thought that the overview section was mandatory, at no point in the process did it indicate to PWGSC that these terms could not be satisfied. Instead, it offered equipment that it apparently knew could not satisfy the terms contained in the overview section of the RFP.⁷ Consequently, the Tribunal is of the view that, if Biz-Pro knew that its own product offering would not satisfy the temperature “requirements” of the RFP, its argument that the terms of the overview were mandatory is devoid of merit.

24. On the basis of the above considerations, the Tribunal concludes that, despite the presence of the verb “will” in the overview section of the RFP, the reference to the range of temperatures in which the

7. The Tribunal notes that, if Biz-Pro believed that there was ambiguity or some other flaw in the RFP that was not corrected in the question and answer exchange, it ought to have filed an objection with PWGSC or a complaint with the Tribunal by, at the latest, bid closing on May 30, 2005, in order to have met the time limit stipulated in section 6 of the *Regulations*.

equipment is intended to be used is not a mandatory requirement. Further, it appears that even Biz-Pro did not initially consider this requirement as mandatory, given that it did not seek to have the RFP amended and, ultimately, offered equipment that it knew could not satisfy the temperature range indicated.

25. The ground of complaint that was accepted for inquiry was that PWGSC awarded a contract to a supplier whose product does not meet the specifications of the solicitation. Following from its conclusion that the temperature range was not a mandatory requirement, the Tribunal finds that there is no basis for concluding that the successful bidder was non-compliant.

26. In light of the foregoing, the Tribunal determines that Biz-Pro's complaint is not valid.

27. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline* (Level 1). The procurement was simple, as it involved the acquisition of POS devices. The complaint was moderately complex, as it dealt with an issue regarding the specifications and mandatory criteria. However, the complaint proceedings were straightforward, as the inquiry process followed the normal 90-day time frame, there were no interveners, and no motions were filed. 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

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

29. 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 Biz-Pro. 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 in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member