



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2007-061

Tenaquip Limited

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, December 18, 2007*

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IN THE MATTER OF a complaint filed by Tenaquip Limited 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

TENAQUIP LIMITED

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 Tenaquip Limited. 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.

Ellen Fry

Ellen Fry
Presiding Member

Hélène Nadeau

Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On October 10, 2007, Tenaquip Limited (Tenaquip) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned a procurement by the Department of Public Works and Government Services (PWGSC) (Solicitation No. E60HP-07TOOL/A) for powered and non-powered hand tools.

2. Tenaquip alleged that PWGSC improperly disqualified its proposal. As a remedy, Tenaquip requested that its proposal be considered compliant and that it be issued a National Master Standing Offer (NMSO). It also requested that the Tribunal postpone the issuance of any standing offers until after it had determined the validity of the complaint.

3. On October 16, 2007, the Tribunal informed the parties that it had accepted the complaint, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² Also on October 16, 2007, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of a contract until the Tribunal had determined the validity of the complaint.³ On November 13, 2007, PWGSC filed the Government Institution Report (GIR). On November 21, 2007, Tenaquip filed its final comments. On November 30, 2007, PWGSC advised the Tribunal that it had no further comments.

4. 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

5. The procurement at issue is a government-wide standing offer for a wide range of hand tools, both powered and non-powered, for various federal government departments and agencies, and certain Crown corporations. The Request for a Standing Offer (RFSO) identified approximately 3,665 line items, consisting of descriptions of various tools and tool parts. These 3,665 line items, in turn, were subdivided into various competing manufactured versions of the identified tools or parts that had been previously qualified by PWGSC for the purposes of the solicitation. The RFSO listed approximately 14,500 items.

6. The due date for the receipt of bids was September 7, 2007. According to PWGSC, 15 offers were received, 13 of which were found compliant. On September 11, 2007, a PWGSC database technician advised the contracting officer that there was a problem with the electronic formatting of Tenaquip's proposal because Tenaquip had sent the wrong file (HTBid.MDB instead of HTCD.MDB). According to PWGSC, the technician confirmed that the file was not only misnamed but also in a different format than required.

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

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

3. In cases where a standing offer has been issued, the Tribunal's postponement of award order postpones the raising of any call-ups against that standing offer until the Tribunal determines the validity of the complaint.

7. On September 17, 2007, PWGSC advised Tenaquip that, because it had not provided PWGSC with an electronic copy of its price list in the mandatory file format required by the RFSO, Tenaquip's bid was considered non-responsive.

8. Between September 17 and October 5, 2007, Tenaquip and PWGSC exchanged a number of letters and facsimiles and had a number of telephone conversations regarding the reason for Tenaquip's disqualification. On October 10, 2007, Tenaquip filed its complaint with the Tribunal.

9. According to PWGSC, the Hand Tool Bid Entry System (Bid System) was developed to aid it in collating, sorting, analyzing and comparing all the information submitted by the bidders. PWGSC submitted that the Bid System had been used in previous solicitations and contained two main elements: (1) a program provided to suppliers through MERX; and (2) the analytical matrix program which analyzes the offers submitted to PWGSC as a result of the use of the distributed program.

10. According to PWGSC, potential suppliers are provided, through MERX, with CD-ROMs loaded with a program that is downloaded into the supplier's computer. The program provides instructions to the supplier on the use of the Bid System and the preparation of the resulting proposal for submission to PWGSC. The Bid System permits the supplier to compose its bid by entering a bid price for any of the items. Once prices have been entered pursuant to the instructions, the Bid System then directs the bidder to record the resulting bid file onto a new CD-ROM along a specified path (C:\PROGRAM FILES\PWGSC HAND TOOL BID SYSTEM\HTCD.MDB) and to submit the resulting CD-ROM to PWGSC as part of its offer. When PWGSC receives all the CD-ROMs, it loads them into its system in order to evaluate the bids.

11. The RFSO contained the following relevant clauses:

PART 3

OFFER PREPARATION INSTRUCTIONS

...

2. PWGSC Hand Tool Bid Entry System - Mandatory, (see Annex "A" for Installation Procedure of PWGSC Hand Tool Bid Entry System)

A CD-ROM designed to include the Offeror's proposed prices and other pertinent information will be provided under separate cover through MERX. **It is mandatory** that the Offeror complete and submit the spreadsheet on the CD-ROM.

It is also mandatory that the offeror submits a paper copy of the proposed prices with its offer.

In the event of a discrepancy between the CD-ROM and the paper copy, the paper copy will prevail.

...

PART 4

EVALUATION PROCEDURES, BASIS OF SELECTION

1. Evaluation Procedures

Offers will be assessed in accordance with the entire requirement of the Request for Standing Offers including the technical and financial evaluation criteria specified below.

It is understood by the parties submitting offers, that, **TO BE CONSIDERED RESPONSIVE**, your offer must meet **ALL THE FOLLOWING MANDATORY REQUIREMENTS**.

...

1.2 Financial Evaluation - Mandatory

Failure to do so will render the offer non-responsive

The Offeror must submit the following with their offer:

- a. One (1) CD-ROM using PWGSC Hand Tool Bid Entry System of the completed spreadsheet with the pricing information and one (1) paper copy of the completed Hand Tool Bid Entry software. **Failure to submit the CD-ROM and a paper copy as required**, will result in the offer being declared non-responsive and the offer will be given no further consideration;

...

2. Basis of Selection

To be considered responsive, an offer must meet all of the mandatory requirements of this RFSO **and must be offering the lowest price for at least one (1) item listed in the PWGSC Hand Tool Bid Entry System**. Offers not meeting all of the mandatory requirements will be given no further consideration.

...

Annex "A"

Requirement and PWGSC Hand Tool Bid Entry System - which list[s] the items to be included in the PWGSC Hand Tool catalogue and Installation Procedure

IMPORTANT

The proper use of this software program is required for the electronic pricing evaluation of offers.

It is a **mandatory** condition that the software pricing system provided is used in the manner in which it is described.

Offers that fail to conform to the PWGSC Hand Tool Bid Entry System will not be evaluated nor given any consideration for an NMSO listing.

...

vi. Using the PWGSC Hand Tool Bid Entry system

...

1. Enter Offers

This will bring the user to the offer entry screen where each item is entered. There is a help button on this screen for details on entering offers.

2. Print Offers

This will print the items entered to any point. You will see an on-screen display of the report; if it is acceptable, click the printer icon to print it.

3. Print Item Descriptions

This will print all items, and can be used as a reference while entering offers.

4. Save Offers

This allows the user to save the entire offer by recording to a new CD for submission to PWGSC in electronic format. This is only necessary once the offer information has been finalized.

NOTE: The Offer must be returned on CD using this PWGSC Hand Tool Bid Entry system in the manner described. Please provide CD along with your paper copy by the offer closing date.

TRIBUNAL'S ANALYSIS

12. 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. Moreover, 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, is the *Agreement on Internal Trade*.⁴

13. The relevant part of Article 506(6) of the *AIT* reads 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.

14. Tenaquip submitted that, although the file that it included on the CD-ROM was formatted as "HTBid.MDB" as opposed to the required "HTCD.MDB" format, that file could still have been easily opened, uploaded and used by PWGSC to evaluate its bid. According to Tenaquip, the HTBid.MDB file program can be opened with Microsoft's Excel program and, had PWGSC done so, it would have shown Tenaquip's completed spreadsheet with the pricing and all detailed information. It submitted that all information required under the RFSO was included in its proposal.

15. Tenaquip argued, as part of the exchanges that took place between it and PWGSC prior to it filing its complaint with the Tribunal, that an internal program error had caused the CD-ROM version not to meet the required standards.⁵ As an attachment to that same correspondence, Tenaquip included a correct version of the CD-ROM which, according to Tenaquip, was in conformance with the requirement. In its comments on the GIR, Tenaquip reiterated its offer to provide a corrected version of the CD-ROM and submitted that it would not receive an unfair advantage and that no other bidder would suffer a prejudice, should it be allowed to submit a CD-ROM in the proper form.

16. Tenaquip submitted that clause 2 of Part 3 of the RFSO also contained a mandatory requirement that bidders submit a paper copy of their respective pricings. It submitted that it had complied with this requirement and had provided such a copy to PWGSC as part of its bid submission. Tenaquip submitted that this clause stated that, "... [i]n the event of a discrepancy between the CD-ROM and the paper copy, the paper copy [would] prevail." It submitted that, as PWGSC had not commented on the paper copy, it presumed that the paper copy was in an acceptable format and that, therefore, PWGSC should have used it when evaluating its proposal.

17. Tenaquip submitted that this is clearly an issue of "form over substance" and that it should not be penalized as a result of this error. It argued that, for these reasons, its proposal should have been accepted and that it should have been issued a standing offer.

18. PWGSC submitted that the inherently complex task of collating, analyzing and comparing all the submitted information, if done by hand, would be lengthy and difficult, even with the assignment of significant resources. According to PWGSC, for the solicitation in question, 15 suppliers submitted proposals, each of which could have contained prices for over 14,500 individual line items. It submitted that

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

5. Tenaquip's letter to PWGSC dated September 28, 2007.

the solicitation at issue makes the use of the specified format mandatory because an offer submitted in another format would be incompatible with PWGSC's analytical tool, thus defeating the purpose of the Bid System. Accordingly, PWGSC submitted that proposals received in an unauthorized and incompatible format were determined to be non-compliant and set aside from further consideration.

19. PWGSC submitted that it is a well-established principle, emphasized by the Tribunal in previous determinations,⁶ and endorsed by the Federal Court of Appeal,⁷ that the conformance of bids with mandatory requirements contained in a solicitation must be evaluated strictly. PWGSC submitted that the requirement for a CD-ROM containing a particular file in a particular format was mandatory and that it underpinned a fundamental element of this procurement process: the manageability of a complex evaluation process. It submitted that, for the benefits of the Bid System to be realized, the use of the software, as specified, was a mandatory requirement that was applicable to all bidders.

20. Regarding Tenaquip's argument that the paper version should take precedence over the electronic version of the pricing list, PWGSC submitted that the purpose and intent of the provision is self-evident on its face: where there is a discrepancy between the *information* (e.g. bid prices) contained in the electronic and paper versions, the paper version of the information shall prevail. It submitted that this provision provides a simple mechanism for dealing with discrepancies that might occur where there are two versions of a document. It submitted that there was nothing in the text of the provision, or the context in which it occurs in the RFSO, to suggest that it acted as an override of the prominently, and repeatedly, stated mandatory requirement that a version of the bid must be submitted on a CD-ROM, in a particular file and format. PWGSC argued that such an interpretation would be in complete conflict with the clear and evident purpose of the mandatory requirement and that the procurement process can only be effectively conducted if all potential suppliers submit their offers in the format that can be accepted, read and analyzed by the Bid System. It further submitted that, given the inherent complexity of the solicitation and the resulting evaluation process, the acceptance of paper bids as overriding the properly formatted electronic copy would render the evaluation process unmanageable. PWGSC argued that it would be unreasonable for it to have included provisions in the RFSO intended to have this result.

21. After reviewing the evidence before it, the Tribunal finds that there was a clear requirement in the RFSO for bidders to submit an electronic copy on a CD-ROM and a paper copy of the proposed prices with their proposals. It was also clearly required by the RFSO that the electronic copy on the CD-ROM be in a particular file format (i.e. HTCD.MDB) in order for it to be properly processed by the Bid System and evaluated by PWGSC and that bids not meeting this requirement would be rejected.

22. Tenaquip has argued that the RFSO did not specify the actual file format that was required and that, even so, because it did submit a file that could be opened with Microsoft's Excel program, PWGSC should have proceeded with the evaluation on this basis. The Tribunal does not agree. In the provisions of the RFSO referred to above, bidders are repeatedly advised as to the mandatory aspect of the CD-ROM and the

6. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT); *Re Complaint Filed by Am-Tech Power Systems Ltd.* (29 September 1999), PR-99-018 (CITT); *Re Complaint Filed by M.D. Heat Techs Inc.* (3 December 1998), PR-98-025 (CITT); *Re Complaint Filed by Métro Excavation inc.* (5 November 1999), PR-99-016 (CITT); *Re Complaint Filed by Marcomm Fibre Optics Inc.* (7 December 1998), PR-98-023 (CITT); *Re Complaint Filed by Fleetway Inc.* (21 April 2004), PR-2003-075 (CITT); *Re Complaint Filed by Bell Mobility* (14 July 2004), PR-2004-004 (CITT).

7. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (F.C.A.).

particular file format on that CD-ROM. While the RFSO does not spell out, in a great degree of detail, the reasons for which the Bid System is required, PWGSC was not required to do so in order to rely on the evaluation procedures set out in the RFSO. The Tribunal notes that Annex “A” of the RFSO clearly informed bidders that:

- the proper use of the Bid System was required for the electronic pricing evaluation of offers;
- it was a mandatory condition that the software pricing system provided be used in the manner in which it was described; and
- offers that failed to conform to the Bid System requirements would not be evaluated or given any consideration for an NMSO listing.

23. If Tenaquip, or any other bidder, had concerns with the use of the Bid System, they had ample opportunity during the bid solicitation phase to make those concerns known to PWGSC and to complain to the Tribunal within the appropriate time frame, if it considered that PWGSC was violating the requirements of the trade agreements. The Tribunal notes that Tenaquip expressed no such concerns. In fact, the Tribunal notes that Tenaquip stated that it had submitted at least five previous proposals in the same manner as it had done for this solicitation. The Tribunal also notes that, as per Exhibit 10 of the GIR, which was a copy of an e-mail sent by PWGSC to Tenaquip regarding Tenaquip’s 2006 CD-ROM submission, Tenaquip provided both the HTBid.MDB and HTCD.MDB files on its CD-ROM and so PWGSC was able to extract the data from the correct file and proceed with that year’s evaluation.⁸ In short, Tenaquip was familiar with the process of both using the Bid System and submitting proposals for this recurring standing offer.

24. In its initial complaint, Tenaquip stated that an internal program error was responsible for its inability to properly transfer the required file to the CD-ROM. However, Tenaquip did not provide any evidence to substantiate this allegation. Furthermore, the Tribunal notes that, after the bid closing date, Tenaquip appeared to be able to produce copies of the CD-ROM in the required file format without any problem, having sent one in with the same letter that alleged the internal program error, and then reiterating the offer to provide the CD-ROM in the required file format when it submitted its comments on the GIR. Accordingly, the evidence does not indicate that it was an internal program error that caused Tenaquip to fail to send the required HTCD.MDB file.

25. Accordingly, the evidence does not indicate that PWGSC failed to follow the criteria stipulated in the RFSO in evaluating Tenaquip’s bid when it determined that Tenaquip, in not providing a CD-ROM with the HTCD.MDB file with its proposal, did not meet a mandatory requirement. The complaint is therefore not valid.

26. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (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 procurement of standard,

8. The Tribunal notes that the version of this e-mail provided by Tenaquip as part of its complaint differs from the version provided by PWGSC. In the complaint, the HTCD.MDB file icon is not visible, as the dialog box at issue was presented in a different resolution, and the portion of the screen which had the HTCD.MDB icon, could not be seen. In the GIR, however, the whole dialog box could be seen and the HTCD.MDB icon is clearly visible.

non-complex items. The complexity of the complaint was also low, in that the issue was straightforward. Finally, the complexity of the complaint proceedings was low, as there were no motions, no interveners and no public hearing, a 90-day time frame was respected, and the parties were not required to file information beyond the normal scope of proceedings. 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

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

28. 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 Tenaquip. 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.

Ellen Fry

Ellen Fry

Presiding Member