



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2008-036

DDI Group Ltd.

*Decision made
Monday, November 24, 2008*

*Decision and reasons issued
Wednesday, December 3, 2008*

IN THE MATTER OF a complaint filed under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

DDI GROUP LTD.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Moreover, subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a Request for a Supply Arrangement (RFSA) (Solicitation No. E6TOR-07RM05/A) by the Department of Public Works and Government Services (PWGSC) for the provision of office moving services on behalf of various government departments and agencies in the Greater Toronto Area and adjacent regions.

3. DDI Group Ltd. (DDI) submitted that its financial bid should have been considered admissible. It suggested that, if the material that it added to the pricing schedule of Annex “B” had in any way rendered its proposal non-responsive, then that fact should have been brought to its attention so that it could have acted accordingly. DDI also suggested that only the additional material should have been considered non-responsive and not the entire bid.

4. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*⁴ or the *Agreement on Government Procurement*⁵ applies. In this case, only the *AIT* applies, as relocation services are excluded from coverage under *NAFTA* and are not included in the list of services subject to the *AGP*.

5. According to the information submitted with the complaint, the solicitation document reads as follows:

...

Section II: Financial Bid

1.1 Bidders must submit ceiling prices in accordance with Annex “B”, “Pricing Schedule”. . . .

6. DDI included, in its complaint, the last page of its financial bid. This page shows part of a completed table, which the Tribunal assumes is the pricing schedule, and additional handwritten information following the table. In particular, the handwritten material includes a “fuel surcharge” that changes relative to the cost of fuel. Moreover, the surcharge is listed as being “negotiable” when the cost of fuel is at or above a certain level.

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

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

3. *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*].

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

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

7. On November 5, 2008, PWGSC advised DDI of the following: "...your bid was considered non-responsive as the Financial Bid was not submitted in accordance with Annex 'B', Pricing Schedule, therefore, we were not able to evaluate your price proposal. ..." Later that day, DDI requested further clarification from PWGSC.

8. On November 6, 2008, PWGSC advised DDI of the following "...it was mandatory that the Bidders MUST submit ceiling prices in accordance with Annex 'B', Pricing Schedule... Unfortunately, your Pricing Schedule submitted included 'Fuel Surcharge', which deviated from the mandatory Pricing Schedule, therefore, we were not able to evaluate your price, resulting in your bid being considered non-responsive. ..."

9. Article 506(6) of the *AIT* provides 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.

10. In previous decisions, the Tribunal has made it clear that suppliers bear the onus to respond to and meet the criteria established in a solicitation.⁶ It has also stated that it will not substitute its judgment for that of the evaluators unless 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 not conducted the evaluation in a procedurally fair way.⁷

11. Upon review, the Tribunal finds that the complaint contains no reasonable indication that the evaluation by PWGSC was not conducted in accordance with the mandatory criteria stated in the solicitation document. The RFSA clearly required that bidders submit ceiling prices. However, DDI failed to adhere to this requirement by submitting a bid that contained prices that were conditional on the cost of fuel.

12. With respect to DDI's suggestion that PWGSC should have brought this matter to its attention or that only the fuel surcharge information should have been considered non-responsive, the Tribunal is of the view that such action would have effectively allowed DDI to modify its original proposal in a substantive manner. This was not simply an issue pertaining to a simple clarification of a discrepancy in the proposal. As the Tribunal has previously stated, "[c]larifications that are not specifically contemplated by the wording of the [solicitation documents] and that amount to substantive changes to a proposal are, in and of themselves, inconsistent with the trade agreements and are generally not permitted."⁸ The Tribunal has also stated that "if bidders were allowed to correct their bids in a substantive way, this would introduce an element of doubt in the supplier community as to the transparency of the competitive bidding."⁹

13. Therefore, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

6. See, for example, *Re Complaint Filed by Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Re Complaint Filed by Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

7. See, for example, *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Marcomm Inc.* (11 February 2004), PR-2003-051 (CITT).

8. *Re Complaint Filed by Hickling Arthurs Low Corporation* (31 March 2004), PR-2003-071 (CITT) at 5.

9. *Re Complaint Filed by Bell Mobility* (14 July 2004) PR-2004-004 (CITT) at 9.

14. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

15. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member