



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2008-030

POL-E-MAR Inc.

*Decision made  
Tuesday, October 21, 2008*

*Decision and reasons issued  
Friday, November 14, 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**

**POL-E-MAR INC.**

**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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (the 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. POL-E-MAR Inc. (POL-E-MAR) alleged that the Department of Public Works and Government Services (PWGSC) improperly disqualified its proposal. In addition, it alleged that the winning bidder might have proposed a product that was not allowable under the terms of the Request for Proposal (RFP) at issue and that, therefore, it should not have been awarded the contract. POL-E-MAR also alleged that the winning bidder had not been required to submit samples for testing, whereas it had been required to do so.

3. 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*,<sup>3</sup> Chapter Five of the *Agreement on Internal Trade*<sup>4</sup> or the *Agreement on Government Procurement*<sup>5</sup> applies. In this case, all three agreements apply.

4. PWGSC, on behalf of the Department of Fisheries and Oceans, made the RFP for Solicitation No. F3051-080001/A available through MERX<sup>6</sup> on April 29, 2008. The procurement was for the provision of light-emitting diode (LED) inserts for marine lanterns. POL-E-MAR submitted its proposal on or before the solicitation closing date of June 16, 2008.

5. According to the complaint, during the evaluation of POL-E-MAR's proposal, PWGSC requested that POL-E-MAR provide samples of some of its proposed goods and requested clarification of a number of items regarding POL-E-MAR's proposal.

6. On September 29, 2008, PWGSC informed POL-E-MAR that its proposal had been disqualified. Subsequently, in an e-mail dated October 1, 2008, POL-E-MAR asked PWGSC for a brief explanation of the reasons why it had been disqualified. The e-mail read as follows:

... I know you mentioned 3.4.1 and another paper we did not supply, was there anything else, we would like to be sure we know what we are talking about before our call tomorrow.

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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](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](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].
  6. Canada's electronic tendering service.

7. PWGSC's reply e-mail of October 1, 2008, indicated that there were three additional areas where POL-E-MAR's bid was non-compliant and read as follows:

...

item 3.5.2 – Low-voltage alternate flash character and item 3.6.3 part “adjustable intensity” are other points that were not addressed properly.

At item 3.4.2 Effective intensity a data chart for light RL-355 was required and was never given to us.

...

8. On October 2, 2008, PWGSC informed POL-E-MAR that the contract award would proceed.

9. According to POL-E-MAR, its proposal was disqualified without it being afforded the opportunity to address concerns that the evaluating technical authority had regarding mandatory requirements 3.5.2 and 4.4.3 of the Statement of Work (SOW) attached to the RFP. POL-E-MAR claimed that its bid met all the requirements of the RFP and that, in accordance with the bid preparation requirements of the RFP, it had explained and demonstrated how it proposed to meet the requirements of the RFP. POL-E-MAR claimed that PWGSC “ignored completely” these explanations. POL-E-MAR also alleged that the winning bidder's products did not meet the requirements of the RFP and that the winning bidder might have offered a prototype product, which was not allowed according to the terms of the RFP. POL-E-MAR also alleged that it had been required to provide samples of some of its products for testing, but that the winning bidder had not been required to do so.

10. Regarding the disqualification of POL-E-MAR's proposal and its allegation that PWGSC ignored its explanations on how it would meet the requirements, the Tribunal finds that there is no reasonable indication that the obligations under the following articles were not respected.

11. Article 506(6) of the *AIT* provides the following: “. . . 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.”

12. Article 1015(4)(a) of *NAFTA* and Article XIII 4(a) of the *AGP* similarly provide that “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . .”

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

14. The Tribunal is of the opinion that the requirements of the RFP were clear in respect of the information that was required from bidders, as well as in respect of the consequences if those requirements were not fulfilled.

15. Part 4 of the RFP, which is entitled “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, states the following:

...

**1.1 Technical Evaluation**

All bids must be completed in full and provide all of the information requested in the bid solicitation to enable full evaluation.

...

**1.1.1 Mandatory Requirements and Evaluation Criteria - Goods**

...

Any proposal which fails to meet the following Mandatory Requirements will be deemed non-responsive and will not be given further consideration . . . .

(a) Technical compliance with specifications at Annex A [the SOW];

...

(d) The offered product shall not be a prototype from the manufacturer.

...

16. According to the information provided with the complaint, PWGSC advised POL-E-MAR, on September 29 and October 1, 2008, that its proposal did not meet the requirements of sections 3.4.1, 3.4.2, 3.5.2 and 3.6.3 of the SOW and, further, that POL-E-MAR had not supplied “another paper”.<sup>7</sup> Having reviewed the complaint package submitted by POL-E-MAR, the Tribunal can find no evidence that demonstrates that PWGSC ignored, or failed to take into account, information found in POL-E-MAR’s proposal. In addition, the Tribunal was unable to find any indication that POL-E-MAR had submitted the required data chart associated with section 3.4.2., which had been noted in PWGSC’s October 1, 2008, e-mail, along with its proposal. Given this, the Tribunal can find no reasonable indication that PWGSC was not acting in accordance with section 1.1.1 of Part 4 of the RFP when it disqualified POL-E-MAR’s proposal.

17. With respect to POL-E-MAR’s allegations that PWGSC (a) did not require the winning bidder to provide a sample and (b) awarded the contract to a bidder that might have proposed a prototype product in contravention of section 1.1.1(d) of Part 4 of the RFP, the Tribunal can find nothing in the complaint to reasonably indicate which products the winning bidder proposed, or whether or not the bidder had been required to provide samples for testing. The Tribunal does note however that the RFP does not contain any provision that *requires* the testing of samples. Thus, even if POL-E-MAR had furnished evidence in support of this allegation, there is nothing, on the face of it, to suggest that this would have been in contravention of the trade agreements. The Tribunal also notes that the RFP incorporated, by reference, clause 15(1)(a) of PWGSC’s 2003 Standard Instructions, which states the following: “In conducting its evaluation of the bids, Canada may, but will have no obligation to, . . . (a) seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation . . . .” The Tribunal is therefore of the view that any request for clarification on the part of PWGSC was in direct response to the particular proposal being evaluated and that PWGSC cannot therefore be required to request the same additional information from each bidder.

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7. There is no indication in the complaint as to what “paper” this statement refers.

18. In light of the foregoing, the Tribunal finds no reasonable indication that PWGSC was not acting in accordance with the applicable trade agreements, particularly with respect to Article 506(6) of the *AIT*, Articles 1015(4)(a) and (d) of *NAFTA* and Articles XIII(4)(a) and (c) of the *AGP*, when it rejected POL-E-MAR's proposal or when it accepted the proposal of the winning bidder. As such, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

## **DECISION**

19. 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