



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-014

RTG Protech Inc.

*Decision made
Thursday, June 4, 2009*

*Decision and reasons issued
Wednesday, June 10, 2009*

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

RTG PROTECH INC.

AGAINST

THE DEPARTMENT OF HEALTH

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 (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. 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 Standing Offer (RFSO) (Reference No. 1000091902) by the Department of Health (Health Canada) for the provision of translation services.
3. RTG Protech Inc. (RTG) alleged that Health Canada improperly declared its proposal non-compliant. RTG also alleged that Health Canada was inconsistent in evaluating its proposal for a similar RFSO (Reference No. 1000091901).
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 conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*⁵ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ applies. In this case, only the *AIT* applies.
5. On August 29, 2008, Health Canada issued RFSO Reference No. 1000091902. On September 26, 2008, bids closed. In a letter dated April 21, 2009, received by RTG the same day, Health Canada advised RTG that its proposal was deemed non-compliant with criterion 13.2 R2.
6. On April 29, 2009, RTG made an objection to Health Canada regarding the evaluation of its proposal. It stated the following: “. . . we believe that we provided enough information to comply with the RFSO requirements. The requirements indicated in the RFSO leave room for interpretation as to what information is needed in order to comply with item 13.2, R2.”

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).

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>.

6. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997).

7. RFSO Reference No. 1000091902 contained the following terms:

7.1 General information

7.1.1 Components, Language and Number of Copies

...

The Bidder shall be responsible for reviewing the Evaluation Plan for this procurement and ensuring that the information required for each area of evaluation is provided in his/her Technical Proposal **in a logical and easy-to-follow format**.

...

7.6 Non-Compliance/Unacceptable Proposals

Failure to meet the Mandatory and Point-Rated Requirements of the RFSO shall result in the Bidder's proposal being declared non-compliant and shall not be considered any further.

...

8.0 Technical Proposal

8.1 General Information

The Technical Proposal must meet all Mandatory Requirements listed in *Section 12.0*, as well as achieve the minimum score identified for the Point-Rated Requirements in *Section 13.0* of this RFSO.

...

Part III BID SELECTION PROCESS

11.0 Introduction

...

Technical Proposals shall be evaluated against the Point-Rated Requirements in the order the stated criteria appear. If a Technical Proposal is assessed as failing to meet the required minimum points of a Point-Rated Requirement, at any stage of the evaluation, the Technical Proposal shall be declared non-responsive and shall be given no further consideration. (For example, if there are three (3) Point-Rated Requirements and the Technical Proposal does not achieve the minimum required points on the second criterion listed (R2), the Technical Proposal is deemed non-responsive and given no further consideration.)

...

Evaluation in response to these criteria is based on a "rules of evidence" approach. That is, the HC Bid Evaluation Committee may only evaluate a Bidder on the basis of the contents of the Bidder's submitted Technical and Financial Proposals, and NOT on any prior knowledge or experience with the Bidder or the Bidder's work. It is therefore the Bidder's responsibility to ensure his/her proposal is complete, clear, and provides sufficient detail to allow HC to evaluate it on the basis of the criteria contained within.

...

13.0 Point-Rated Requirements

13.1 Method of Evaluation

... It is the responsibility of the Bidder to ensure the completeness, clarity, and provision of sufficiently detailed evidence to enable the HC Bid Evaluation Committee to evaluate the Bidder's proposal.

...

13.2 Point Rated Requirements

...

<p>Point-Rated Requirement R2 Bidder's Availability</p> <p>The Bidder's availability to the Branch, three hundred and sixty five (365) days a year, shall be evaluated against the following three (3) factors:</p> <ul style="list-style-type: none"> • The Bidder has demonstrated (<i>through past and present experience</i>) that his/her proposed Translator(s) is available to work regular work hours and during weekends and statutory holidays, when needed. • The Bidder has demonstrated (<i>through past and present experience</i>) his/her access to a back-up resource(s) who is of similar or greater ability and attainment of his/her proposed translator(s). • The Bidder has provided information pertaining to his/her Email, telephone, cellular phone, facsimile, pager and/or other, accessible twenty four (24) hours a day, seven (7) days a week. 	<p>...</p>	<p>...</p>
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8. On May 20, 2009, Health Canada provided RTG with information regarding the evaluation of its proposal and effectively denied RTG the relief that it requested. Health Canada included information in that communication that indicated that no back-up resource was mentioned in RTG's proposal and that there was no résumé to support who the back-up resource might be and his/her past and present experience. In addition, according to that information, RTG's proposal indicated its hours of work and its ability to deliver translation services 365 days per year; however, no reference was made to the translators in question, nor did the form demonstrate or express any such past or present experiences involving these same resources.

9. On May 30, 2009, RTG filed its complaint with the Tribunal. In its complaint, RTG submitted that the "... RFP did not clearly indicate what information we needed to provide in order to comply with this condition."

10. The Tribunal is of the view that the solicitation document was clear, in that the above applicable bid procedures and requirements stated clearly the conditions that had to be met by the bidder.

11. In *ISE Inc.*,⁷ the Tribunal stated the following:

50. The responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder. In *Trans-Sol Aviation Service Inc.*, the Tribunal stated as follows:

11. The Tribunal is of the view that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation and that it accurately reflects the bidder's intention ultimately resides with the bidder. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal and to make sure that it is compliant with all essential elements

7. *Re Complaint Filed by ISE Inc.* (25 May 2009), PR-2008-049 (CITT).

12. In previous decisions, the Tribunal has 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.

13. The Tribunal finds that there is no evidence to indicate that Health Canada did not properly apply the evaluation criteria as stated in the solicitation document. Consequently, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not conducted in accordance with the applicable trade agreement.

14. With respect to RTG's allegation that Health Canada was inconsistent in evaluating its proposal for a similar RFSO (Reference No. 1000091901), the Tribunal notes that RTG's complaint in that case was not accepted for inquiry, as it was deemed to have been filed outside of the required time limit. The Tribunal further notes that, in principle, when solicitation documents contain mandatory evaluation criteria, it is generally the practice that failure to meet *any* mandatory criterion at *any* stage in the evaluation process will result in the proposal being declared non-compliant and that no further consideration will be given to that bid.

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

DECISION

16. 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