



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-011

InterCall Canada

*Decision made
Monday, June 1, 2009*

*Decision and reasons issued
Thursday, June 11, 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

INTERCALL CANADA

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.

Ellen Fry
Ellen Fry
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 procurement (Solicitation No. EN869-071160/B) by the Department of Public Works and Government Services (PWGSC) for the provision of feature-rich audio teleconferencing and Web conferencing on behalf of its Information Technology Services Branch.

3. InterCall Canada (InterCall) alleged that PWGSC improperly and unfairly applied the terms and conditions of the solicitation in evaluating its proposal and erroneously concluded that its proposal was non-compliant.

4. On November 10, 2008, PWGSC issued a Request for Proposal (RFP) for the above-noted services. The due date for receipt of bids was February 9, 2009. InterCall submitted a bid within the allotted time frame. On May 11, 2009, PWGSC advised InterCall that its proposal was disqualified for two reasons:

- due to the inclusion of a “disclaimer” paragraph in its proposal, InterCall failed to meet a mandatory requirement that bidders accept all the clauses of the bid solicitation; and
- InterCall did not provide pricing data for required fields.

5. 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 the *Agreement on Government Procurement*⁵ or Chapter Kbis of the *Canada-Chile Free Trade Agreement*⁶ applies. In this case, while the *AIT* and the *CCFTA* apply,⁷ the Tribunal notes that InterCall only alleges that the procurement has not been conducted in accordance with the provisions of the *AIT*.

6. 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.

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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> [*AIT*].
 5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
 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) [*CCFTA*].
 7. As per Annex 1001.1b-2 of *NAFTA*, the services in question are excluded from coverage under that trade agreement. The services in question are not offered for coverage under the *AGP*.

7. Article Kbis-10(1) of the *CCFTA* provides the following:
1. An entity shall require that in order to be considered for award, a tender must be submitted in writing and must, at the time it is submitted:
 - a. conform to the essential requirements of the tender documentation; and
 - b. be submitted by a supplier that has satisfied the conditions for participation that the entity has provided to all participating suppliers.

8. With respect to the disclaimer language that, it acknowledged, was included in its proposal, InterCall submitted that PWGSC had erred in taking it into consideration, as it did not form part of that portion of its proposal which constituted what, in InterCall's view, the RFP mandated as a "bid". InterCall argued that Part 3 of the RFP, below, carefully articulated exactly what comprised a bid, as well as what specific information was to be used by PWGSC in its evaluation:

PART 3 - BID PREPARATION INSTRUCTIONS

3.1 Bid Preparation Instructions

- (a) Canada requests that bidders provide their bid in separately bound sections as follows:
 - (i) Section I: Technical Bid . . .
 - (ii) Section II: Financial Bid . . .
 - . . .
- (b) Canada requests that bidders follow the format instructions described below in the preparation of their bid:
 - (i) use 8.5 x 11 inch . . . paper;
 - (ii) use a numbering system that corresponds to the bid solicitation;
 - (iii) include the certifications as a separate section of the bid;
 - (iv) include a title page at the front of each volume of the bid that includes the title, date, solicitation number, bidder's name and address and contact information; and
 - (v) include a table of contents.

9. InterCall acknowledged that the following clause appeared in its submission:

DISCLAIMER

This proposal for conferencing Services to Customer is a preliminary non-binding response based on InterCall's understanding of Customer's conferencing needs as of the date of this submittal and is to be used as a basis for discussion between the parties. No legal terms and conditions have been reviewed in connection with this response and all terms and conditions must be negotiated between the parties. Neither the RFP nor this response constitutes legally binding rights or obligations for either party.

However, it submitted that, as a result of the above-noted RFP conditions, PWGSC was simply not entitled to take into consideration any information beyond that mandated by the RFP, regardless of what that information was or how relevant it may otherwise have been to the bid. It argued that the disclaimer clause was simple "boilerplate language" inadvertently included in the introductory section to the material filed by InterCall.

10. InterCall submitted that there was no information contained in its actual bid (i.e. its technical proposal, financial proposal and cover page) that attempted in any way to modify the mandatory provisions of the RFP, including those that PWGSC had advised that it had violated. InterCall also noted that its technical bid included the following statement:

Section I: Technical Bid

- (a) Any requirement designated in the RFP and the Statement of Work by term “must” is mandatory. Bids that do not meet all mandatory requirements will be declared non-responsive.

InterCall Response

InterCall has read and understands this requirement.⁸

11. The Tribunal considers that the bid preparation instructions in the RFP did not limit what InterCall could include in its bid. These instructions requested that bidders structure their bids in a particular manner and required that they include a minimum amount of mandatory information. The instructions did not place a limit on the information which could be included nor the number of pages allowed in the technical proposal. Whether intentionally, or through inadvertence or administrative error, InterCall’s proposal included the disclaimer language at issue and, in the Tribunal’s opinion, PWGSC was obligated to consider that information when conducting its evaluation.

12. The Tribunal notes that, in addition to the above-noted clauses regarding the structure of the proposals, the RFP contained the following:

PART 7 - RESULTING CONTRACT CLAUSES

The following clauses apply to and form part of any contract resulting from the bid solicitation. Except where specifically set out in the bid solicitation, acceptance of the Bidder of all clauses is a mandatory requirement of the bid solicitation. No modification or other terms and conditions included in a bid will apply to any resulting contract even if the bid is incorporated into that contract. *Any bid that contains statements implying that the bid is conditional on modification of these clauses, or containing terms and conditions that purport to supersede these clauses, will be considered non-responsive.* Bidders with concerns about these clauses should raise their concerns in accordance with the Enquiries provision of this bid solicitation.

[Emphasis added]

13. The Tribunal considers the RFP to be clear: if a bidder implied that its bid was conditional on the modification of clauses, it was to be deemed non-responsive. A plain reading of InterCall’s disclaimer clause makes it apparent that InterCall did not consider its proposal to be its final response to the RFP, but that it was, instead, an initial step in negotiations between it and PWGSC. These negotiations would probably have led to changes in the terms and conditions of the RFP, reflected in any future contract. The Tribunal notes that this disclaimer clause appeared in the technical section, as well as in the original and amended financial sections of its proposal. While InterCall may now argue that the disclaimer language is extraneous, it is clear that the disclaimer language was included as part of the bid.

8. Complaint, tab I at 10.

14. The Tribunal also does not accept InterCall's argument that, even if the disclaimer language is considered part of its bid, interpreting it in the context of the remainder of the bid leads to the conclusion that InterCall fully intended to comply with all the provisions of the solicitation as written. To the contrary, InterCall's disclaimer clause clearly indicates that it did not consider the RFP or its proposal to be binding, merely a starting point for negotiations.

15. With respect to InterCall's alternative argument that, even if the Tribunal were to conclude that the disclaimer clause could modify a mandatory requirement of the solicitation, procedural fairness required that PWGSC seek clarification from InterCall concerning this issue, the Tribunal notes that the RFP did not require PWGSC to seek any clarification from bidders. Moreover, neither the *AIT* nor the *CCFTA* imposes such an obligation on a procuring entity.

16. Given that, in failing to meet this mandatory criterion, InterCall's bid was properly declared non-responsive and therefore not eligible to be awarded a contract, the Tribunal does not need to address the second ground of complaint regarding the provision of pricing data.

17. 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.

18. In light of the foregoing, 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.

Ellen Fry
Ellen Fry
Presiding Member