



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-032

Greenbank Custom Woodworking
Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, October 14, 2009*

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IN THE MATTER OF a complaint filed by Greenbank Custom Woodworking Ltd. 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

GREENBANK CUSTOM WOODWORKING LTD.

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 Greenbank Custom Woodworking Ltd. 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.

André F. Scott

André F. Scott
Presiding Member

Dominique Laporte

Dominique Laporte
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On July 16, 2009, Greenbank Custom Woodworking Ltd. (Greenbank) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned Solicitation No. W8474-099079/A issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the supply, delivery and set-up of 30 mobile LAN workstations.

2. Greenbank alleged that its proposal met all the mandatory requirements of the Request for Proposal (RFP) and was priced roughly 20 percent lower than the proposal of the successful bidder, Holmes & Brakel (H&B). Greenbank also alleged that H&B's proposed product did not meet the mandatory technical requirements of the RFP. As a remedy, Greenbank requested that it be awarded the contract or, if the contract awarded to H&B was not cancelled, that it be awarded \$20,000 for lost profit, sales and prestige.

3. On July 23, 2009, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On August 17, 2009, PWGSC submitted the Government Institution Report (GIR). On August 26, 2009, Greenbank filed its comments on the GIR. On September 15, 2009, the Tribunal requested additional documentation from PWGSC seeking clarification of information contained in the GIR regarding the evaluation of H&B's proposal. On September 17, 2009, PWGSC provided the requested information.

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 written information on the record.

PROCUREMENT PROCESS

5. On April 2, 2009, PWGSC made the subject RFP available through MERX.³ The due date for the receipt of bids was May 13, 2009, with Greenbank and at least six other bidders submitting proposals. On May 15, 2009, PWGSC asked Greenbank and H&B for additional technical information regarding their proposed products, including a commercial catalogue and shop drawings. On May 19, 2009, Greenbank provided PWGSC with shop drawings. On May 21, 2009, H&B provided PWGSC with the requested information. On May 26, 2009, PWGSC's technical advisor informed the contracting authority that it found option 2 of H&B's proposal non-responsive to the requirements of the RFP and requested further information regarding option 1 of the proposal.⁴ On May 26, 2009, PWGSC asked for additional information from H&B regarding workstation option 1, which H&B provided on May 27, 2009. On July 6, 2009, PWGSC advised Greenbank that its technical proposal was non-compliant with the mandatory requirement to provide a commercial catalogue and that the contract had been awarded to H&B. The same day, Greenbank responded to PWGSC stating that the requirement was "... clearly a custom application where no literature could be applicable."⁵ On July 8, 2009, PWGSC advised Greenbank of additional instances of non-compliance with the mandatory requirements of the RFP.

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

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

3. Canada's electronic tendering service.

4. H&B's proposal contained two different workstation options.

5. Complaint, exhibit 3 at 1.

6. On July 16, 2009, Greenbank filed its complaint with the Tribunal.

POSITION OF PARTIES

7. Greenbank submitted that it was initially informed that its proposal had been rejected because it had not provided a commercial catalogue for its proposed workstations. It argued that, as the workstations being sought by PWGSC were to be custom-made and not off-the-shelf,⁶ it did not have a commercial catalogue for the items in question. Greenbank argued that, contrary to PWGSC's assertion in the GIR that its proposal was declared non-compliant because it failed to submit a commercial catalogue providing descriptive literature of its proposed workstation,⁷ the drawings that it submitted on May 19, 2009, did constitute "descriptive literature" and consisted of highly detailed colour illustrations and specifications. It submitted that, after it questioned PWGSC's decision and indicated its intent to file a complaint with the Tribunal, PWGSC provided additional obscure reasons of non-compliance.

8. Greenbank also alleged that there were numerous omissions in H&B's proposal, as evidenced by the questions in the technical evaluation report that the technical authority sent the contracting authority on May 26, 2009.⁸ Greenbank equally argued that the "minor clarifications" described by PWGSC were in fact "... major monolithic omissions and failures ..."⁹ Greenbank submitted that these questions indicate that H&B's proposal was lacking in significant information, including, amongst other mandatory technical requirements, the height of the unit and its static weight load. Greenbank submitted that these omissions vastly outweigh its own minor clarification issues and the non-provision of "glossy literature".¹⁰ Greenbank also submitted that it searched the fluidgroup.com¹¹ Web site, which, it claimed, should have contained information on the furniture described in option 1 of H&B's proposal, and failed to find anything remotely resembling the workstations at issue.

9. PWGSC submitted that, as one of the three lowest-priced bidders, Greenbank was specifically requested, in accordance with clause 1.1b) of Part 4 of the RFP, to provide a commercial catalogue and shop drawings. While noting that Greenbank did provide the drawings, PWGSC stated that Greenbank's proposal supplied no descriptive text or literature describing its proposed workstation nor did it explain or demonstrate how it met the requirements of the RFP. PWGSC argued that the requirement was not, as alleged by Greenbank, custom in nature and that Greenbank's proposal of a custom workstation does not excuse its disregard for a mandatory requirement of the RFP nor does it justify its inaction in not seeking clarification of, or changes to, the requirement during the bidding period. PWGSC noted that clause 1.1b) of Part 4 of the RFP specifically advised bidders that failure to submit a commercial catalogue would render a bid non-compliant.

10. PWGSC also argued that Greenbank is tacitly asking the Tribunal to accept that its shop drawings satisfy the independent requirement for a commercial catalogue. It submitted that, regarding this solicitation, the commercial catalogue assisted the technical evaluator in assessing the modularity of a proposed workstation by illustrating components as individual pieces, allowing for retrofits, growth, add-ons, reconfigurations and relocations. PWGSC argued that catalogues can provide true dimensions of components not fully illustrated in shop drawings and that the existence of a commercial catalogue offers some assurance of product longevity, allowing for future equipment retrofits.

6. Comments on the GIR at 1.

7. GIR at para. 49.

8. Complaint, exhibit 4.

9. Comments on the GIR at 1.

10. *Ibid.*

11. *Ibid.*

11. PWGSC submitted that, upon determining that Greenbank had not provided the required catalogue, it terminated its evaluation and that this was the information that it imparted to Greenbank on July 6, 2009. After Greenbank objected to its disqualification, PWGSC claimed to have finished the evaluation and, on July 8, 2009, it furnished Greenbank with all the examples of its non-compliance, including that its central processing unit (CPU) shelf failed to meet the specification.

12. Regarding the evaluation of H&B's proposal and the subsequent awarding of the contract to H&B, PWGSC submitted that H&B had proposed two different solutions in response to the RFP, only one of which, option 1, was found to be compliant. PWGSC submitted that, during the evaluation process, it sought minor clarifications regarding option 1 of H&B's proposal, but that such clarification questions do not indicate that a proposal is non-compliant. PWGSC referenced decisions of both the Tribunal¹² and the Federal Court of Appeal¹³ that supported what it claimed was its decision to seek legitimate clarifications concerning option 1 of H&B's proposal. PWGSC also noted that H&B's responses did not substantially modify its proposal. PWGSC also submitted that the "technical evaluation report" to which Greenbank refers was better characterized as the "form" by which PWGSC sought clarification of option 1.¹⁴

TRIBUNAL'S ANALYSIS

13. 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. Furthermore, at the conclusion of the inquiry, the Tribunal must determine the validity of the complaint 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, are the *Agreement on Internal Trade*¹⁵ and the *North American Free Trade Agreement*.¹⁶ According to the information in the complaint, the contract applied to goods with an estimated value below the monetary thresholds of the *Agreement on Government Procurement*¹⁷ and the *Canada-Chile Free Trade Agreement*.¹⁸ Accordingly, the Tribunal finds that these agreements do not apply in this case.

14. Article 506(6) of the *AIT* provides that "[t]he 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."

15. Article 1013 of *NAFTA* provides that the tender documents "... shall contain all information necessary to permit suppliers to submit responsive tenders... [and] shall also include... the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders..."

12. *Re Complaint Filed by Fleetway Inc.* (21 April 2004), PR-2003-075 (CITT).

13. *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (F.C.A.).

14. GIR at para. 55.

15. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

16. *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*].

17. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

18. *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). Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.

16. Similarly, Article 1015(4) of *NAFTA* states that “[a]n entity shall award contracts in accordance with the following”:

- a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

- c. unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;

- d. awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation;

...

17. The issue before the Tribunal is whether PWGSC evaluated Greenbank’s and H&B’s proposals and awarded the contract to H&B in accordance with the criteria set out in the RFP.

18. The relevant provisions of the RFP read as follows:

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION¹⁹

...

1.1 Technical evaluation

- a) Only products, which are technically compliant with Annex “A” at time of bid closing, will be considered for contract award.
- b) The Bidder must submit the following information with the bid at bid closing date or within 5 days of written notification from the contracting authority. Failure to submit the information will result in your bid being declared non-responsive:
 - Submit finish sample of metal.
 - One (1) copy of the commercial catalogue, which shall include descriptive literature pertaining to the product in Annex A – Statement of Requirement.
 - Bidders must submit a shop drawing which includes a plan view, full elevations and isometric view with all dimensions and [its] pertinent information mentioned in Section 4.0

Example:

Structural Frame System’s static weight load capacity, casters and frame dimensions.

Cable Management’s data/voice and power cable tray information.

Slat Wall’s dimensions and specifications.

Monitor Mounting’s specifications and show amount of LCD monitor’s as per Section 4.5.

CPU Shelf’s Dimensions and location with amount of CPU per shelf

Work surface’s Dimensions, hardware, finishes and edge details.

...

19. RFP at 5.

2. Basis of Selection

2.1 A bid must comply with all requirements of the bid solicitation to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.

19. The Tribunal also notes that section 4 of the “2003 (2008-12-12) Standard Instructions – Goods or Services – Competitive Requirements” was incorporated by reference into the RFP. It states as follows:

04 Submission of Bids

...

2. It is the Bidder’s responsibility to:

- (a) obtain clarification of the requirements contained in the bid solicitation, if necessary, before submitting a bid;
- (b) prepare its bid in accordance with the instructions contained in the bid solicitation;
- ...
- (f) provide a comprehensible and sufficiently detailed bid, including all requested pricing details, that will permit a complete evaluation in accordance with the criteria set out in the bid solicitation.

20. With respect to the ground of complaint regarding the evaluation of Greenbank’s proposal, the Tribunal is of the view that clause 1.1b) of Part 4 of the RFP clearly advised bidders of the requirement to provide commercial catalogues as part of their submissions and of the consequence if such a catalogue was not provided:

- b) *The bidder must submit the following information with the bid at bid closing date or within 5 days of written notification from the contracting authority. Failure to submit the information will result in your bid being declared non-responsive:*

...

One (1) copy of the commercial catalogue, which shall include descriptive literature pertaining to the product in Annex A – Statement of Requirement.

[Emphasis added]

21. Greenbank argued that the drawings that it provided constituted its “descriptive literature” and contained all the information that PWGSC required. The Tribunal does not accept this argument. The Tribunal is of the view that it is incumbent upon a potential supplier to seek clarification or raise any concerns about a requirement, especially a mandatory one, at the earliest possible instance. The Tribunal considers that the requirement for a “commercial catalogue”, even though it notes that the term was not specifically defined anywhere in the RFP, is a clear mandatory condition of the subject tendering process.

22. In *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,²⁰ the Federal Court of Appeal confirmed the validity of the Tribunal’s approach on this issue as follows:

[18] In procurement matters, time is of the essence. . . .

...

[20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . .

20. 2002 FCA 284 (Can LII).

[21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of an RFP should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

23. If it was unsure that it could satisfy the requirement for a commercial catalogue, Greenbank should have questioned PWGSC regarding the information that was required in such circumstances. The Tribunal notes that the RFP contained a clause allowing for bidders to submit written questions,²¹ but that no bidder challenged this particular requirement or sought clarifications regarding its content.

24. The Tribunal has emphasized in numerous previous cases that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder.²² Therefore, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal and to ensure that it is compliant with all essential requirements.

25. The Tribunal finds that the solicitation document was clear, in that section 2.1 of Part 4 of the RFP stated unequivocally that “[a] bid must comply with all requirements of the bid solicitation to be declared responsive. . . .” 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. In light of the foregoing, the Tribunal determines that PWGSC was correct to declare Greenbank’s proposal non-compliant and, therefore, that Greenbank’s first ground of complaint is not valid.

26. With respect to Greenbank’s allegations that H&B’s proposal was improperly evaluated and that H&B should not have been awarded the contract, Greenbank alleged that H&B’s product failed to meet several important mandatory requirements of the RFP. PWGSC, on the other hand, argued that it had sought legitimate, minor clarifications from H&B and that H&B’s product was compliant with the mandatory requirements of the RFP and that the contract had been awarded appropriately.

27. The Tribunal notes that clause 1.1b) of Part 4 of the RFP allowed bidders to supply certain information at one of two times, either (1) with their proposals or (2) within five days of written notification from the contracting authority.

28. In this case, the Tribunal considers that PWGSC’s questions of May 26, 2009, reflect legitimate questions as contemplated by the examples provided at clause 1.1b) of Part 4 of the RFP. The Tribunal would not characterize these questions and answers as minor clarifications. The answers provided added substantive information to H&B’s bid. However, this type of additional information being added after the deadline for the receipt of bids had passed was clearly contemplated by the wording of the RFP as indicated above. Consequently, while the Tribunal does not agree with PWGSC that the questions asked were minor clarification questions, the Tribunal does agree with PWGSC’s position that it was entitled to take this information into account for purposes of bid evaluation.

29. Accordingly, the Tribunal finds that the complaint is not valid and awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Greenbank.

21. RFP, Part 2, section 3.

22. *Re Complaint Filed by Trans-Sol Aviation Service Inc.* (1 May 2008), PR-2008-010 (CITT); *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT); *Re Complaint Filed by ISE Inc.* (25 May 2009), PR-2008-049 (CITT).

COSTS

30. 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 was for a few simply defined items. The complexity of the complaint was low, in that the grounds of complaint involved a single criterion. Finally, the complexity of the complaint proceedings was low, as there were no motions and no interveners, a public hearing was not required, and the 90-day time frame was respected. 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

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

32. 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 Greenbank. 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.

André F. Scott
André F. Scott
Presiding Member