



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-033

Mustang Survival Corp.

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 Mustang Survival Corp. 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

MUSTANG SURVIVAL CORP.

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 Mustang Survival Corp. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, 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.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On July 17, 2009, Mustang Survival Corp. (Mustang) 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 a procurement (Solicitation No. W8485-098789/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of survival vests.

2. Mustang alleged that PWGSC improperly awarded a contract to a non-compliant bidder. More specifically, it alleged that, as a result of a discrepancy between the wording of the Request for Proposal (RFP) and the attached DND specification, proposals submitted by other bidders, including the winning bidder, failed to include the cost and labour necessary to supply two moulded mounting plates into the survival vest. Mustang added that, since it had included such costs as part of its bid, it was placed at a competitive disadvantage. As a remedy, Mustang requested that it be awarded the contract.

3. On July 22, 2009, the Tribunal informed the parties that the complaint had been accepted for inquiry, since 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 July 27, 2009, PWGSC acknowledged receipt of Mustang's complaint and confirmed that a contract had been awarded to Apparel Trimmings Inc. (Apparel). On August 13, 2009, PWGSC submitted the Government Institution Report (GIR). On August 24, 2009, Mustang filed its comments on the GIR.

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 November 25, 2008, PWGSC made available through MERX³ an RFP for the supply of 600 survival vests. The due date for the receipt of bids was January 6, 2009. According to PWGSC, three bidders, including Mustang and Apparel, submitted proposals in response to the RFP.

6. On March 5, 2009, PWGSC advised Mustang that the contract had been awarded to Apparel. On March 11, 2009, Mustang wrote to PWGSC regarding an alleged ambiguity within the solicitation documentation. Mustang stated that, in accordance with clause 12 of Part 5 of the RFP, its proposal had included production lead times and costs for the supply and labour associated with the acquisition of two mounting plates to be attached to the survival vests—one for the aircrew chemical defence ventilator system (ACDVS) and one for the chemical defence respirator (CDR) manifold. Mustang also noted that a DND specification included with the RFP stated that the ACDVS and CDR mounting plates (the mounting plates) were to be provided as government-supplied materiel (GSM). Mustang argued that the cost and labour for the mounting plates was significant and that, if it had not included the costs for the mounting plates in its bid, it would have been able to offer its vests at significantly lower prices. It also noted that its

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

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

3. Canada's electronic tendering service.

current proposal mirrored the successful proposals that it had submitted in response to five previous solicitations.⁴

7. On March 13, 2009, PWGSC advised Mustang that it was reviewing Mustang's concerns and would respond as soon as it had an answer. On March 16, 2009, Mustang provided PWGSC with additional details regarding its arguments. It also posed two questions: (1) whether or not it was clear to all bidders that they were to supply the mounting plates and that they would not be provided as GSM; and (2) whether the winning bid included the cost and labour for supplying the mounting plates. Mustang also requested that the solicitation be re-tendered. PWGSC responded the same day by advising Mustang that the matter was being reviewed and that it would advise Mustang "soon". On March 18, 2009, Mustang filed a complaint with the Tribunal (File No. PR-2008-059). On March 27, 2009, the Tribunal advised Mustang that its complaint was premature, as it had not yet received a response to its objection and, therefore, had not yet received a denial of relief, as contemplated by subsection 6(2) of the *Regulations*. On April 1, 2009, Mustang informed PWGSC of the Tribunal's decision and requested that PWGSC advise it of when it would make its decision. Later that same day, PWGSC advised Mustang that its submission was still under review and that it would advise Mustang once a decision had been reached.

8. On June 8, 2009, Mustang again asked PWGSC for an update. On June 10, 2009, PWGSC advised Mustang that the case was being reviewed by its legal counsel and that Mustang would "hear from them soon". That same day, PWGSC legal counsel advised Mustang that the matter was being reviewed "at the senior levels" and that a decision would be sent "in a few days". On June 26, 2009, Mustang filed its second complaint (File No. PR-2009-020) with the Tribunal. On July 3, 2009, the Tribunal informed Mustang that its complaint was once again premature, as it had not yet received a response to its objection and, therefore, had still not yet received a denial of relief, as contemplated by subsection 6(2) of the *Regulations*. However, the Tribunal advised Mustang that, if PWGSC did not respond to its objection by July 31, 2009, this considerable delay would effectively amount to constructive knowledge of denial of relief. On July 7, 2009, Mustang received a letter dated July 6, 2009, from PWGSC denying its request that it be awarded the contract.

9. On July 17, 2009, Mustang filed the current complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

10. 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 whether the complaint is valid 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

4. Complaint, Appendix 3. Mustang claims to have been awarded contracts W8485-073161/001/PR, W8485-074402/001/PR, W8485-074738/001/PR, W8485-086026/001/PR and W8485-097850/001/PR based on similar solicitation documents and proposals.

conducted in accordance with the applicable trade agreements, which, in this case, is only the *Agreement on Internal Trade*.⁵

11. 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."

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

PART 1 – GENERAL INFORMATION

...

2. STATEMENT OF REQUIREMENT

The Bidder must provide the deliverables in accordance with the technical requirements and in the quantities specified in the line item detail.

PART 2 – BIDDER INSTRUCTIONS

...

Bidders who submit a bid agree to be bound by the instructions, clauses and conditions of the bid solicitation and accept the clauses and conditions of the resulting contract.

...

PART 3 – EVALUATION PROCEDURES AND BASIS OF SELECTION

1. EVALUATION PROCEDURES

(a) Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical and financial evaluation criteria.

...

2. BASIS OF SELECTION

To be considered responsive, a bid must comply with all requirements of the bid solicitation. Bids not meeting these requirements will be declared non responsive.

Recommendation for contract award will be based on the lowest responsive aggregate price (1 contract only). Ranking will be established using all quantities for all destinations.

...

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*]. According to the RFP, the procured goods are classified under Federal Supply Classification group 84. In accordance with Section A of Annex 1001.1b-1 of the *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*], only the goods listed in Section B of that annex purchased by (or on behalf of) DND are included for coverage. As Section B does not include group 84, this procurement is not covered under *NAFTA*. Annex 1 of the *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*], provides a list of the goods that are covered when purchased by (or on behalf of) DND; group 84 is not included; therefore, the procurement is not covered by the *AGP*. In accordance with Section A of Annex Kbis-01.1-3 of Chapter Kbis of the *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*], only the goods listed in Section B of that annex purchased by (or on behalf of) DND are included for coverage. As Section B does not include group 84, this procurement is not covered under the *CCFTA*.

PART 5 – RESULTING CONTRACT CLAUSES

...

2. STATEMENT OF REQUIREMENT

The Contractor must provide the deliverables in accordance with the technical requirements and in the quantities specified in the line item detail forming part of this Contract.

2.1 Technical Requirement: Supplies shall conform to Specifications and drawings stated at the Design Data List (DDL), sent to bidders by the Department of National Defence.

...

10. PRIORITY OF DOCUMENTS

If there is a discrepancy between the wording of any documents that appear on the list, the wording of the document that first appears on the list has priority over the wording of any document that subsequently appears on the list.

- a) These Articles of Agreement;
- b) 2010A (2008/15/12) General Conditions – Goods (Medium Complexity);
- c) Specifications;
- d) Drawings;
- e) The Contractor's bid dated _____

...

12. MATERIALS: CONTRACTOR TOTAL SUPPLY

The Contractor will be responsible for obtaining all materials required in the manufacture of the item(s) specified. The delivery stated for the item(s) allows the necessary time to obtain such materials.

13. As presented above, clause 2.1 of Part 5 of the RFP requires that the supplies, i.e. the survival vest that would be the object of the ensuing contract, conform to the specifications and drawings stated at the Design Data List (DDL). One of the specifications stated at the DDL is DND specification D-22-521-000/SF-001, which is entitled "Specification for Survival Vest, Jet Aircrew NSN 8415-21-907-9318 and Survival Vest, Helicopter and Transport Aircraft NSN 8415-21-907-9272" (the DND specification). The DND specification provides the following regarding the mounting plates:

3.6.15 Aircrew Chemical Defence Ventilator System (ACDVS) mounting plate. The ACDVS mounting plate shall be fire retardant sewable polyurethane, NSN 5340-21-913-8953 will be provided as GSM.

3.6.16 Chemical Defence Respirator (CDR) Manifold mounting plate. The CDR Manifold mounting plate shall be fire retardant sewable polyurethane, NSN 5340-21-913-8954 will be provided as GSM.

14. Mustang submitted that there is a discrepancy between the DND specification, which states that the mounting plates will be provided as GSM, and clause 12 of Part 5 of the RFP, which states that the contractor will be responsible for obtaining all materials required in the manufacture of the survival vests. In its view, this discrepancy can be resolved by clause 10 of Part 5 of the RFP, which provides that the articles of agreement (i.e. the resulting contract clauses of Part 5 of the RFP) take precedence over any specifications or drawings. Therefore, according to Mustang, all materials and components required for the manufacture of the survival vests, including the mounting plates, were to be supplied by the winning bidder.

15. Mustang submitted that, since its offer included all such materials and components, including the mounting plates, it was compliant with the requirements of the solicitation. In this respect, Mustang noted that, between 2005 and 2008, it was awarded a total of six contracts for the provision of identical survival vests. It added that, in each of these instances, the RFPs in question included the same clauses and DND specification as found in the current RFP and that, each time, Mustang supplied the mounting plates. Therefore, in Mustang's view, this history does not support PWGSC's assertion that Mustang's supply of the mounting plates under past contracts was allowed as a result of administrative oversight. Instead, Mustang took the position that this history established a reasonable precedent for both PWGSC and Mustang to interpret the current solicitation documents as requiring that the mounting plates be supplied by the contract awardee rather than as GSM.

16. Mustang submitted that, since it was able to confirm with the only known supplier of the mounting plates that it was the only manufacturer to request a quote for their production, other bidders, including Apparel, were non-compliant with the requirement to supply all materials for the manufacture of the survival vests. It further submitted that, by including in its bid the cost and labour necessary to supply the mounting plates, it was placed at a competitive disadvantage vis-à-vis the other bidders.

17. PWGSC submitted that Mustang misinterpreted the requirements of the RFP, which required a contractor to *obtain*, not *supply*, all materials required for the manufacture of the survival vests, including the mounting plates. It submitted that, since the DND specification stated that the mounting plates were to be provided as GSM, the winning bidder was required, for purposes of manufacturing the survival vests, to *obtain* the mounting plates from the Government as GSM. In its view, there is no ambiguity in the solicitation documents.

18. PWGSC submitted that, to the extent that there may be a conflict between the title of clause 12 of Part 5 of the RFP (i.e. "**MATERIALS: CONTRACTOR TOTAL SUPPLY**") and the specific terms of that clause (i.e. "The Contractor will be responsible for obtaining all materials required in the manufacture of the item(s) specified"), which it denies, the specific terms should prevail. In this respect, it argued that titles are inserted for the convenience of reference only and cannot prevail over the specific terms of the clause.

19. PWGSC further submitted that its interpretation of the solicitation documents is supported by the fact that the mounting plates are not commercially available to suppliers. It noted that the mounting plates are manufactured using moulds owned by DND and that these moulds are currently in the possession and/or control of Mustang. It explained that, prior to 2005, Mustang supplied the survival vests to DND on a non-competitive basis and that, to facilitate their production, it was given possession and/or control of DND's mounting plate moulds. It further explained that, in 2005, DND chose to procure 1,000 of each of the two mounting plates from Mustang in order to facilitate competition for the supply of the survival vests by providing the mounting plates as GSM. PWGSC submitted that, since 2005, all solicitations for survival vests have been competitive and that it was only through administrative oversight that Mustang, being in the unique position to acquire the mounting plates on its own, was able to supply survival vests without obtaining the mounting plates from the government as GSM.

20. Finally, PWGSC submitted that nowhere in its proposal does Mustang state or imply that it would obtain, as other than GSM, the mounting plates for its survival vests. PWGSC argued that Mustang provided no evidence that it would have supplied the mounting plates, that it would have incurred costs to obtain the mounting plates or that these costs were factored in its bid price. It added that, even if Mustang's complaint is valid, which it denies, Mustang has suffered no injury or loss, as the spread between the bidders' proposed prices for the supply of the survival vests and the unit prices for the mounting plates is such that Mustang would not have been the winning bidder.

21. This complaint turns on the issue of whether or not the RFP clearly identified the requirements of the procurement and the criteria to be used in the evaluation of bids, as required under Article 506(6) of the *AIT*. It further requires that the Tribunal determine whether PWGSC's interpretation and application of those criteria in the evaluation of the winning bid was reasonable under the circumstances.

22. As the Tribunal has indicated in the past, it does not generally 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 proposal, 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 manner.⁶

23. The principal issue of contention in this case is whether or not the words of the DND specification, which state that the mounting plates are to be provided as GSM, can, in the context of this procurement and in view of the language of clause 12 of Part 5 of the RFP, be interpreted to mean anything other than the mounting plates will be provided to the contractor by the Government, as is claimed to be the case by Mustang. This issue is obviously important, as it goes to the ultimate formulation of a bidder's proposal in terms of price, which, as indicated in clause 2 of Part 3 of the RFP, is the sole consideration for purposes of contract award for bidders meeting the requirements of the procurement.

24. The Tribunal is of the view that there is no ambiguity in the language of the RFP in terms of the statement of requirement and that the various elements which, together, serve to define its meaning are clear as to the fact that the Government would be supplying the mounting plates to be used in the manufacture of the survival vests and, by necessary implication, that the contract awardee would be expected to obtain the mounting plates from the Government.

25. The DND specification is clear; it states that the mounting plates will be provided as GSM. This language leaves no doubt as to its possible interpretation. It means what it says, i.e. that the Government will supply the mounting plates.

26. With respect to effect of clause 12 of Part 5 of the RFP, and more particularly its title (i.e. "**MATERIALS: CONTRACTOR TOTAL SUPPLY**"), the Tribunal agrees with PWGSC that the title is inserted for convenience of reference and does not prevail over the specific terms of the clause. In the Tribunal's opinion, the terms of the clause simply indicate that the contractor will be responsible for obtaining all materials that are necessary for the production of the survival vests. In relation to the mounting plates, considering the language of the DND specification, it means that the contract awardee will be expected to obtain the mounting plates from the Government.

27. On that basis, the Tribunal concludes that there was no ambiguity within the solicitation documents—the requirement stipulated that the mounting plates were to be supplied by the Government and that, consequently, the contract awardee was expected to obtain such mounting plates from the Government.

28. The Tribunal notes that it agrees with Mustang that past government practice can, in certain cases, be relevant to the interpretation of solicitation documents. However, the Tribunal must be extremely prudent in considering past practice as an indication of parties' current intentions. For example, the ultimate outcome of previous procurements regarding the same goods may have been dictated by considerations that are not necessarily germane to the issues currently confronting the Tribunal. Depending on the circumstances of

6. *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT).

those procurements (e.g. perhaps Mustang was the only bidder or had submitted the lowest price irrespective of whether or not it included the cost for the mounting plates in its proposed price), this could render their consideration irrelevant to the current interpretative exercise. No evidence has been provided in respect of the specific circumstances surrounding the previous procurements, other than PWGSC's admitted existence of administrative oversight. Whether those circumstances necessarily had an influence on the ultimate outcome of those procurements remains unknown, and the Tribunal will not venture to speculate on the matter.

29. Having said that, the Tribunal is of the opinion that past practice cannot modify the clear textual meaning of the words contained in the solicitation documents. As stated above, the textual meaning of the words is clear in this case and cannot be modified. Rather than indicating that PWGSC's previous interpretation and application of provisions identical to those contained in the current solicitation documents coincide with that of Mustang, the Tribunal is of the view that past government practice, in this case, reflects a series of "administrative oversights" on the part of PWGSC—an admission that must have been difficult to make.

30. The Tribunal also notes that Mustang, irrespective of the outcome of some of the previous procurements, was aware that the Government had the mounting plates and that it must have meant for them to be used at some point. It must also have been aware that the mounting plates were not commercially available. This is clearly evidenced by the fact that Mustang had, and continues to have, possession of the moulds used to manufacture the mounting plates and that, in 2005, it supplied the Government with 2,000 mounting plates. Although this is not a relevant consideration for purposes of interpreting the current solicitation documents, it does indicate that Mustang should have questioned whether its own interpretation of the solicitation documents was correct.

31. In conclusion, the Tribunal finds that PWGSC's interpretation of the requirements of the procurement was reasonable and that, as result, it properly conducted the evaluation of the winning bid.

32. In the light of the foregoing, the Tribunal determines that Mustang's complaint is not valid.

COSTS

33. In its comments on the GIR, Mustang argued that PWGSC's request for costs should be denied on the basis that it did not explicitly respond to specific questions raised by Mustang prior to it filing its complaint with the Tribunal. It submitted that, if information requested in relation to whether the contract awardee had included the mounting plates or requested them as GSM from PWGSC had been provided, it may not have proceeded with the complaint. However, as no response was given, Mustang is of the view that its recourse to the Tribunal was a reasonable and predictable outcome.

34. In the Tribunal's opinion, while it is true that PWGSC could have provided Mustang with the information that it requested prior to it filing its complaint with the Tribunal, it is difficult to see how Mustang could have chosen, on the basis of this information, not to proceed with its complaint. As it has now been made clear that the winning bidder requested the mounting plates as GSM from the Government, the Tribunal fails to understand how this information could have led Mustang not to file a complaint with the Tribunal, given its strong conviction that bidders were required to supply the mounting plates themselves. Furthermore, the Tribunal is of the view that nothing in the evidence demonstrates that the time taken by PWGSC to respond to Mustang's objection added to the complexity of the matter before the Tribunal or added procedural difficulties. For these reasons, the Tribunal will not depart from its usual approach to the award of costs.

35. In view of the above and the circumstances of this complaint case, 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 slightly complex off-the-shelf items. The complexity of the complaint was low, in that the grounds of complaint involved a minor technical matter regarding the alleged ambiguity of the RFP. Finally, the complexity of the complaint proceedings was low, as there were no motions or 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

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

37. 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 Mustang. In accordance with the *Guideline*, 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.

Serge Fréchette
Serge Fréchette
Presiding Member