



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-034

Ex Libris (USA) Inc.

*Decision made
Monday, July 27, 2009*

*Decision and reasons issued
Tuesday, August 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

EX LIBRIS (USA) 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.

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. 5Z011-090190/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Library and Archives of Canada (LAC) for the provision of an integrated library software system.

3. Ex Libris (USA) Inc. (Ex Libris) alleged that PWGSC did not clearly set out the instructions for the receipt of bids, resulting in Ex Libris incorrectly directing its proposal to LAC instead of PWGSC.

4. On May 15, 2009, PWGSC issued the Request for Proposal (RFP). On July 7, 2009, bids closed. According to Ex Libris, on July 3, 2009, it delivered its proposal to the LAC office. On July 7, 2009, Ex Libris advised PWGSC that it had submitted a proposal and that it wanted to ensure that it had been received. On July 8, 2009, PWGSC advised Ex Libris that its proposal was at LAC and that it would be up to the PWGSC Bid Receiving Unit to decide whether the proposal would be accepted. On July 9, 2009, PWGSC advised Ex Libris that its proposal had been declared late as it was not delivered to the PWGSC Bid Receiving Unit by the date and time indicated on page 1 of the RFP. That same day, Ex Libris sent a letter to PWGSC requesting that it reconsider its decision. On July 14, 2009, PWGSC advised Ex Libris that it had no choice but to reject Ex Libris's proposal on the basis that it was late.

5. In its complaint Ex Libris acknowledged that it delivered its bid to LAC. However, it submitted that the information on the first page of the solicitation document was confusing and misleading as there is a box titled "Destination - of Goods, Services, and Construction", which states the address of LAC. This information is directly below other information on the bid closing date and time. Ex Libris acknowledged that the first page also states PWGSC's address under the heading "RETURN BIDS TO". However, this information is listed outside of the main box, which displays other crucial information regarding bid submission.

6. Page 1 of the RFP, in the top left-hand corner, states as follows:

**RETURN BIDS TO:
RETOURNER LES SOUMISSIONS À:
Bid receiving - PWGSC / Réception des
soumissions - TPSGC
Place du Portage, Phase III
Core 0A1/Noyau 0A1
11 Laurier St./11, rue Laurier
Gatineau
Québec
K1A 0S5
Bid Fax: (819) 956-3370**

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

7. Page 1 of the RFP also indicates two other addresses:

In the bottom left-hand corner, the RFP indicates the address of the issuing office, which reads as follows:

Issuing Office - Bureau de distribution
Shared Systems Division (XL)/Division des systèmes
partagés (XL)
4C1, Place du Portage Phase III
11 Laurier St./11, rue Laurier
Gatineau
Québec
K1A 0S5

In the top right-hand boxed area, the RFP indicates the destination address of the goods, which reads as follows:

Destination - of Goods, Services, and Construction:
Destination - des biens, services et construction:
LIBRARY AND ARCHIVES CANADA
PLACE DE LA CITE 8TH FL.
550 DE LA CITE BLVD
ATTN: CHARLES DAVIS
GATINEAU
Québec
K1A0N4
Canada

8. 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, while all the trade agreements are applicable to the procurement, Ex Libris, as an American supplier, only has recourse under *NAFTA* and the *AGP*.

9. Ex Libris referred to certain provisions of *NAFTA* and of the *AGP* and asserted their applicability to its situation.

10. Article 1008 of *NAFTA* provides as follows:

1. Each Party shall ensure that the tendering procedures of its entities are:
 - a. applied in a nondiscriminatory manner; and
 - b. consistent with this Article and Articles 1009 through 1016.

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>.

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).

2. In this regard, each Party shall ensure that its entities:
 - a. do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and
 - b. provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.
11. Further, Article 1015(2) of *NAFTA* provides as follows:

No entity may penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity's procedures so provide.
12. Paragraph 1 of Article X of the *AGP* provides as follows:

To ensure optimum effective international competition under selective tendering procedures, entities shall, for each intended procurement, invite tenders from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system. They shall select the suppliers to participate in the procedure in a fair and non-discriminatory manner.
13. Clause 2.1 of Part 2 of the RFP states as follows: "Bids must be submitted only to Public Works and Government Services Canada (PWGSC) Bid Receiving Unit by the date, time and place indicated on page 1 of the bid solicitation."
14. Clause 2.2 of Part 2 of the RFP states as follows: "Timely and correct delivery of bids is the sole responsibility of the Bidder. Public Works and Government Services Canada (PWGSC) will not assume or have transferred to it those responsibilities. All risks and consequences of incorrect delivery of bids are the responsibility of the Bidder."
15. Clause 2.3 of Part 2 of the RFP states as follows: "It is the policy of PWGSC to return, unopened, bids delivered after the stipulated bid solicitation closing date and time, unless they qualify as a delayed bid as described in Standard Instructions and Conditions 2003 (2008/12/12)."
16. Clause 6 of the Standard Instructions and Conditions 2003 (2008/12/12) stipulates as follows:
 1. A bid delivered to the specified bid receiving unit after the closing date and time but before the contract award date may be considered, provided the bidder can prove the delay is due solely to a delay in delivery that can be attributed to the Canada Post Corporation (CPC) (or national equivalent of a foreign country). . . .
 3. Misrouting, traffic volume, weather disturbances, labour disputes or any other causes for the late delivery of bids are not acceptable reasons for the bid to be accepted by PWGSC.
17. It is thus clear that, pursuant to the applicable trade agreements, PWGSC has the responsibility to ensure that the tendering process is carried out in a manner that is non-discriminatory, in a manner that does not penalize a supplier for bids received after the end of the bidding period as a result of mishandling that was solely the fault of PWGSC and in a manner that may allow for the consideration of late bids if PWGSC's own procedures so provide. Consistent with the authority granted in Article 1015(2) of *NAFTA*, PWGSC has incorporated in its Standard Instructions and Conditions referenced for this procurement the exceptional circumstances in which it would also consider tenders received after the time specified for receiving tenders.

18. With regard to discrimination, the information provided with the complaint does not indicate that PWGSC's rejection of the proposal submitted by Ex Libris constitutes discrimination or is procedurally unfair. The evidence does not indicate preferential treatment on the part of PWGSC, and the procedures applied by PWGSC are clearly outlined in the Standard Instructions and Conditions 2003 (2008/12/12), which, pursuant to the RFP, were made equally applicable to every bidder, for the event that a bidder's situation fits the circumstances outlined therein.

19. With regard to late bids, the instructions in the main text of the RFP are specific. The evidence indicates that the bid could probably have been filed on time if the Crown had notified Ex Libris that the address was incorrect when LAC received the bid. However, the incorrect delivery of the proposal by Ex Libris to LAC instead of PWGSC cannot be attributed solely to PWGSC, given the fact that PWGSC's procedures were clear. Consequently, there is no reasonable indication that Article 1015(2) of *NAFTA* was violated.

20. In PWGSC's procedures allowing for the consideration of late bids, incorporated by reference into the RFP, the condition for the acceptance of delayed bids as set out in the Standard Instructions and Conditions 2003 (2008/12/12) is also specific. Since the evidence does not indicate that the delay can be attributed to the Canada Post Corporation, paragraph 1 of Clause 6 of the Standard Instructions and Conditions 2003 (2008/12/12) does not apply. Further, paragraph 3 of Clause 6 of the Standard Instructions and Conditions 2003 (2008/12/12) clearly excludes misrouted proposals from consideration as delayed bids.

21. Thus, the Tribunal finds that the complaint does not indicate that PWGSC failed to follow the requirements of the RFP when it rejected Ex Libris' proposal for being received by PWGSC after the bid closing date.

22. Accordingly, the Tribunal finds that the evidence does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements.

23. The Tribunal notes that, as indicated above, page 1 of the RFP shows no fewer than three government addresses: PWGSC's bid receiving unit's address, the address of the destination of the goods and the address of the PWGSC issuing office. In addition, Clause 3.2 of the RFP states the address where bidders are to direct their enquiries. This address has a notation at the bottom, which reads as follows: "NOTE: *** Do not forward proposals to the above address ***".

24. Although the RFP clearly stated the address where bids were to be sent, it is possible for the multiplicity of addresses in the RFP to be confusing to bidders. PWGSC may wish to consider the merits of implementing procedures to handle future situations in which a bidder has used a reliable delivery method and in which, had the bid been delivered to the correct address, the bid would have been considered to have been received on time.

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

DECISION

26. 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