



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2010-010

KB Enterprises LLC

*Decision made  
Wednesday, May 12, 2010*

*Decision and reasons issued  
Thursday, June 4, 2010*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

**BY**

**KB ENTERPRISES LLC**

**AGAINST**

**THE DEPARTMENT OF INDUSTRY**

**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.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Dominique Laporte  
Dominique Laporte  
Secretary

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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. IC 800073) by the Department of Industry (Industry Canada) for the provision of spectrum auction services.
3. KB Enterprises LLC (KB) alleges that the language in the mandatory requirements of the Request for a Supply Arrangement (RFSa) caused it not to address a point in writing that Industry Canada considered necessary to be provided in writing.
4. KB indicates that it did not include a text description of its telebid capabilities because the solicitation neither requested nor required it. KB assumed that the point in question would be demonstrated in a subsequent *in persona* software demonstration.
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 conducted in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,<sup>3</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>4</sup> the *Agreement on Government Procurement*,<sup>5</sup> Chapter Kbis of the *Canada-Chile Free Trade Agreement*<sup>6</sup> or Chapter 14 of the *Canada-Peru Free Trade Agreement*<sup>7</sup> applies.
6. KB, a U.S. company,<sup>8</sup> cannot benefit from the provisions of the *AIT*, the *CCFTA* and the *CPFTA*. As such, only *NAFTA* and the *AGP* apply to this complaint.
7. On November 19, 2009, Industry Canada issued an RFSa for the provision of spectrum auction services. The tendering period of the RFSa closed on January 6, 2010. On the closing date, KB submitted a technical proposal in response to the RFSa.

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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](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](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*]. Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

8. The information provided with the complaint indicates that KB has a business address in Washington, D.C.

8. In an e-mail dated April 14, 2010, KB was advised that its proposal failed to demonstrate compliance with mandatory requirement 13.8 of Part II of the RFSA and that, as such, it was eliminated from further consideration.

9. KB was also advised that six bid proposals were received and that supply arrangements for the requirement were offered to the three top-ranked bidders.

10. On April 27, 2010, KB held a teleconference with Industry Canada during which it objected to its proposal being deemed non-compliant and requested that the proposal be considered to have met the mandatory requirement of RFSA Reference 13.8 of Section 13.0 of Part II of the RFSA. Industry Canada denied this request.

11. On May 6, 2010, KB filed its complaint with the Tribunal.

12. The Tribunal considers the filing of this complaint as timely.

13. With respect to tender documentation, Article 1013(1) of *NAFTA* reads as follows:

1. . . . The documentation shall also include:

. . .

h. the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . .

14. Article XII(2) of the *AGP* reads as follows:

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders . . .

. . .

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . .

15. Article 1015(4)(a) of *NAFTA* and Article XIII 4(a) of the *AGP* similarly provide that “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation . . . .”

16. Article 12.1 of Section 12.0 (“Evaluation Procedures”) of Part II of the RFSA provides the following:

The evaluation and selection process is comprised of three (3) stages as follows:

**Stage One: Evaluation of Mandatory Requirements**

During Stage One, the proposals will be evaluated for compliance with each of the Mandatory Requirements, as listed in Section 13.0 below, set out in this RFSA.

Proposals that do not meet all of the Mandatory Requirements will be set aside at the end of Stage One and not receive any further consideration.

17. RFSA Reference 13.8 of Section 13.0 (“Mandatory Requirements”) of Part II provides the following:

The Offeror must describe the authentication and security solution to substantiate the fulfillment of the requirements in Section 6.2.3.

The Offeror must also demonstrate that it will be possible for IC to access the auction system using a secure telebid account with an IC specific password and authentication.

18. The Tribunal considers that there are two distinct requirements contained in RFSA Reference 13.8.

19. RFSA References 13.6 and 13.7 of Section 13.0 include a note advising that the mandatory criterion “. . . will be further demonstrated by a sample auction system demonstration as specified in Section 15.0 below, and will be evaluated as a separate step in the evaluation process . . . .”

20. The Tribunal notes that RFSA Reference 13.8 contains no such proviso relating to a “further” demonstration. The requirements of RFSA Reference 13.8 were therefore immediate and needed to be met in the technical proposal itself, not at a “further” stage, as may be the case in RFSA References 13.6 and 13.7.

21. In *Info-Electronics H P Systems Inc.*,<sup>9</sup> the Tribunal stated as follows:

23. In previous decisions, the Tribunal has made it clear that suppliers bear the onus to respond to and meet the criteria established in a solicitation. The Tribunal has also made it clear that the bidder bears the onus to seek clarification before submitting an offer. It has also 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.

[Footnotes omitted]

22. The Tribunal finds that RFSA Reference 13.8 is clear. A bidder’s *technical proposal* was to demonstrate compliance with the criterion in its entirety. Although KB addresses the first requirement of RFSA Reference 13.8 in its technical proposal, it is completely silent as to the second.

23. So being, the Tribunal concludes that there is no evidence to indicate that Industry Canada did not apply itself in the evaluation of KB’s proposal, that it ignored vital information or that it wrongly interpreted the scope of the requirement. There is also no evidence to indicate that Industry Canada based its evaluation on undisclosed criteria or conducted the evaluation in a procedurally unfair way.

24. To the contrary, the Tribunal is of the view that, in the circumstances, it was reasonable for Industry Canada to deem KB’s proposal non-compliant. Therefore, the Tribunal considers that it would not be appropriate to substitute its judgment for that of the evaluators in this matter.

25. In light of the foregoing, the Tribunal does not find that the complaint discloses a reasonable indication that the procurement was not conducted in accordance with *NAFTA* or the *AGP* as directed by paragraph 7(1)(c) of the *Regulations*. Therefore, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

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9. *Re Complaint Filed by Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT).

**DECISION**

26. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Jason W. Downey

Jason W. Downey

Presiding Member