



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2010-093

S.i.Systems Ltd.

*Decision made
Tuesday, March 22, 2011*

*Decision and reasons issued
Thursday, April 14, 2011*

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

S.i. SYSTEMS LTD.

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.

Diane Vincent
Diane Vincent
Presiding Member

Dominique Laporte
Dominique Laporte
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. EN869-101919/A) by the Department of Public Works and Government Services (PWGSC) for the provision of task-based informatics professional services.

3. S.i.Systems Ltd. (S.i.Systems) alleged that PWGSC improperly disqualified its proposal by relying on undisclosed mandatory evaluation criteria and by unreasonably refusing to consider information provided by S.i.Systems in support of its pricing.

4. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.” Subsection 6(2) provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

5. In other words, a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant has 10 working days to file a complaint with the Tribunal after it has actual or constructive knowledge of the denial of relief by the government institution.

6. On June 14, 2010, PWGSC issued a Request for Proposal (RFP) for the provision of task-based informatics professional services.

7. With respect to the financial evaluation of bids, Article 4.3(c) of the RFP, “**Firm Per Diem Median Rate Evaluation Method**”, reads as follows:

For each Resource Category, the median band will be calculated using the median function in Microsoft Excel median function and will represent a range that encompasses the median rate to a value of minus (-) 20% of the median. The Lower Median Band Limit for each Resource Category is set at 80% of the median. If a bidder quotes a firm per diem rate for a Resource Category that is lower than the Lower Median Band Limit, that bidder’s financial evaluation will be conducted using a per diem rate equal to the Lower Median Band Limit for that Resource Category.

...

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

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

Bidders proposing rates that are lower than the Lower Band Limit must provide adequate substantiation for those rates, if required to do so by the Contracting Authority

Should the Bidder be unable to substantiate unreasonably low rates, the proposal will be considered non-responsive and will receive no further consideration.

8. Article 4.3(d) of the RFP, “**Substantiation of Professional Services Rates**”, reads as follows:

In Canada’s experience, bidders will from time to time propose rates at the time of bidding for one or more categories of resources that they later refuse to honour, on the basis that these rates do not allow them to recover their own costs and/or make a profit. When evaluating the rates for professional services bid, Canada may, but will have no obligation to, require price support for any rates proposed (either for all or for specific Resource Categories). An example of price support that Canada would consider satisfactory includes:

(i) an invoice (and related contract serial number) that shows that the Bidder has recently provided and invoiced another customer (with whom the Bidder deals at arm’s length) for services similar to the services that would be provided in the relevant Resource Category, where those services were provided in the Ottawa area for at least three months within the twelve months prior to the bid solicitation issuance date, and the fees charged were equal to or less than the rate offered to Canada;

. . .

Once Canada requests substantiation of the rates bid for any Resource Category, it is the sole responsibility of the Bidder to submit information (as described in the example above or as otherwise requested by Canada) that will allow Canada to determine whether it can rely, with confidence, on the Bidder’s ability to provide the required services at the rates bid. Where Canada determines that the information provided by the Bidder does not substantiate the unreasonably low rates, the proposal will be considered non-responsive and will receive no further consideration.

9. On July 7, 2010, bids closed. S.i.Systems submitted a bid in response to the RFP.

10. On October 28, 2010, PWGSC requested that S.i.Systems provide adequate substantiation of the rates proposed for various resource categories in accordance with Articles 4.3(c) and (d) of the RFP.

11. Between November 3 and 8, 2010, S.i.Systems submitted information which, in its view, substantiated its rates and demonstrated that the rates contained in the bid were not unreasonably low.

12. On November 23, 2010, PWGSC advised S.i.Systems that it could not complete an evaluation of its proposal because the proposal still lacked information. PWGSC required that S.i.Systems provide invoices of the kind identified in Article 4.3(d)(i) of the RFP, i.e. invoices that showed that similar services had recently been provided at a rate equal to or less than the rate quoted in its bid.

13. On November 29, 2010, S.i.Systems provided additional information in support of its pricing and indicated to PWGSC that the market for IT professionals had been depressed, which allowed it to provide more favourable rates to PWGSC.

14. On December 20, 2010, PWGSC informed S.i.Systems that, since its proposal still lacked information, it could not complete its evaluation. It again requested that S.i.Systems provide invoices that showed that similar services had recently been provided at a rate equal to or less than the rate quoted in its bid, as identified in Article 4.3(d)(i) of the RFP. It also advised S.i.Systems that, if the requested information was not provided, it would determine that the information already submitted did not substantiate the rates quoted and that its proposal would be considered non-responsive and receive no further consideration.

15. On December 29, 2010, S.i.Systems wrote to PWGSC and stated that, in accordance with Article 4.3(d) of the RFP, the basis for requesting price substantiation was to ensure that bidders could "... recover their own costs and/or make a profit." It mentioned that the information already provided, including contractual evidence that disclosed the rates paid to its consultants, demonstrated that it could recover its costs. Finally, it requested that PWGSC confirm whether S.i.Systems' evidence of cost recovery was acceptable to PWGSC.

16. On December 30, 2010, PWGSC responded to S.i.Systems by noting that, pursuant to Article 4.3(d) of the RFP, once information is requested by Canada, it is the sole responsibility of the bidder to submit that information. It further advised S.i.Systems that it could not complete its evaluation without receiving the information requested in its e-mail of December 20, 2010. Finally, PWGSC noted that, although S.i.Systems may have felt that the information already provided would be sufficient for evaluation purposes, in order to be fair to all bidders from whom substantiation had been requested, it needed to obtain the same type of substantiation from all bidders, i.e. invoices that showed that similar services had recently been provided at rates equal to or less than the rates quoted by bidders in their proposals.

17. On January 11, 2011, S.i.Systems replied to PWGSC and noted that its concern had not been addressed. Although it recognized that PWGSC requested invoices of the kind identified in Article 4.3(d)(i) of the RFP, it argued that the indication that such invoices would be the only evidence accepted as part of the price substantiation process contradicted the RFP and past accepted justifications.

18. On January 12, 2011, PWGSC responded to S.i.Systems and advised that its question had been answered in its e-mail of December 30, 2010, and that no further information would be provided.

19. On January 18, 2011, S.i.Systems sent additional documentation to PWGSC, including evidence of *per diem* rates that S.i.Systems was required to pay its consultants and the resulting gross profit margins. It did not provide invoices that showed that similar services had recently been provided at a rate equal to or less than the rate quoted in its bid.

20. On March 1, 2011, PWGSC advised S.i.Systems that its proposal was deemed non-compliant and was disqualified on the basis that the invoices provided did not show that the fees charged were equal to or less than the rate offered to PWGSC. Thus, PWGSC found that the *per diem* rates quoted in its proposal were unreasonably low and not substantiated.

21. On the basis of the evidence submitted in the complaint, the Tribunal is of the view that the basis of the complaint became known or reasonably should have become known to S.i.Systems at the latest on December 30, 2010. As mentioned above, S.i.Systems alleged that PWGSC improperly disqualified its proposal by relying on undisclosed mandatory evaluation criteria and by unreasonably refusing to consider information provided by S.i.Systems in support of its pricing.

22. In its December 20, 2010, e-mail, PWGSC clearly stated that, if the requested information was not provided, it would determine that the information already submitted would not substantiate the rates proposed and that its proposal would be considered non-responsive.³ Further, PWGSC's e-mail of December 30, 2010, sent in response to S.i.Systems' e-mail of December 29, 2010, which had asked whether alternate proof of cost recovery was acceptable, essentially indicated that such information was not sufficient and confirmed that it required information of the type requested in Article 4.3(d)(i) of the RFP

3. See confidential complaint, tab G, last paragraph of PWGSC's e-mail.

from all bidders.⁴ As such, the Tribunal can only conclude that S.i.Systems knew or reasonably should have known, at the latest, on December 30, 2010, that PWGSC was requiring a specific type of information to support the prices proposed by S.i.Systems, which it could not provide, and was refusing to consider S.i.Systems' evidence of cost recovery, which would lead to the disqualification of its proposal. Therefore, S.i.Systems had until January 14, 2011, at the latest (i.e. within 10 working days after December 30, 2010), to make an objection to PWGSC or to file a complaint with the Tribunal. S.i.Systems filed its complaint with the Tribunal on March 15, 2011.

23. Even if the Tribunal were to consider that S.i.Systems' e-mail of January 11, 2011, was an objection, PWGSC's response of January 12, 2011, to that e-mail would be considered a denial of relief. Therefore, the Tribunal would still consider that the complaint was filed outside the time limit established in the *Regulations*.

24. As stated by the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,⁵ "[i]n procurement matters, time is of the essence. . . . potential suppliers . . . 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."⁶

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.

Diane Vincent
Diane Vincent
Presiding Member

4. See confidential complaint, tab H, paras. 4 and 5 of PWGSC's e-mail dated December 30, 2010.

5. 2002 FCA 284 (CanLII).

6. 2002 FCA 284 (CanLII) at paras. 18, 20.