



Procurement  
Review  
Board  
of Canada

La commission  
de révision  
des marchés publics  
du Canada

**IN THE MATTER OF:**

**A Complaint  
By Kaysam Worldwide Inc.  
of 55 Shepherds Lane  
Totowa, New Jersey**

**as represented by  
Morris/Rose/Ledgett  
Toronto, Ontario**

**Board File No:  
D92PRF66K-238-0023**

**Complaint Dismissed**

**AND IN THE MATTER OF:**

**The Free Trade Agreement  
Implementation Act, Part II, Sec. 15  
S.C. 1988, Ch. 65.**

**September 9, 1992**

**DETERMINATION BY THE BOARD**

**The Complaint**

On June 11, 1992, the Procurement Review Board (PRB or the Board) received a complaint filed pursuant to section 15 of the *Canada-United States Free Trade Agreement Implementation Act* (FTAI Act) from Morris/Rose/Ledgett, Barristers and Solicitors on behalf of Kaysam Worldwide Inc., Totowa, New Jersey (Kaysam). The complainant alleged that the Atmospheric Environment Service (AES) of the Department of the Environment (DOE), while purchasing various weather balloons through the Department of Supply and Services (DSS), denied them the right and equal opportunity to respond to the requirements of the procurement entity. Specifically, they stated:

*The procurement process involving the procurement of RFP#2 breached the requirements of Article 1305 of the Act, specifically:*

*Kaysam's right and equal opportunity to respond to the requirements of AES in the tendering and bidding phase was denied due to the fact that the specifications provided by AES in RFP #2 are identical or substantially the same as the performance specifications of the Totex product. Consequently, these specifications worked to defeat Kaysam's efforts to respond to and participate openly and competitively in the tendering and bidding phase...*

*AES did not use decision criteria in the evaluation of bids and awarding of contracts that best met the requirements specified in RFP #2. Additionally, the technical and cost evaluation performed by AES were flawed and had a fair evaluation been made, Kaysam should have been awarded the contract.*

The complainant met the criteria for filing in accordance with subsection 21(1) of the *Procurement Review Board Regulations* (Regulations). The receipt of the complaint was acknowledged to the complainant and DSS was officially notified on June 12, 1992 and sent a copy of the complaint.

The Board considered the complaint as being separable into two distinct elements. The first is Kaysam's allegation that the AES specifications in question were virtually identical to those of a competitor's product and that making compliance to these specifications mandatory was unfair. The Board, for this element, is of the view that the basis for this portion of the complaint was known or should have been known once Kaysam had reviewed the bid documentation prior to the closing date for receipt of bids. Subsection 23(1) of the Regulations requires that the complaint in this case be filed prior to the closing date but not later than 10 days after the basis of the complaint is known or should reasonably have been known. The Board is also of the view that the exceptions stipulated in subsection 23(4) of the Regulations do not apply in this case. It is on this basis that this element of the complaint is considered late and will, therefore, not be dealt with herein.

The second element is Kaysam's allegation that the evaluation of their bid was unfair. Since knowledge of the evaluation results was not known until June 2, 1992 and Kaysam's complaint was filed within 10 days of that date, the complaint is considered timely in accordance with subsection 23(2) of the Regulations and has been accepted for investigation as, on its face, it met the criteria for acceptance pursuant to subsection 28(1) of the Regulations. A Notice of Complaint was published in the Canada Gazette, Part I and Government Business Opportunities (GBO).

DSS filed the Governmental Institution Report (G.I.R.) with the Board on July 28, 1992. A copy of the relevant portions of the report was sent to the complainant and they, in turn, filed comments with the Board on August 6, 1992. The complainant's comments were forwarded to DSS.

### **The Investigation**

The allegations of this complaint, the government's response to those allegations and the complainant's comments on the government's response were investigated by the Board's staff by means of interviews and the examination of documents.

The following people were interviewed by telephone or in person to confirm various statements made and/or contained in the documentation:

Mr. David Salvisburg, Manager, Downsview Procurement; Mr. Paul Thomson, Contracting Officer, Ontario Region Procurement; Ms. Marilyn Watt, Contracting Officer, all of the Department of Supply and Services, Downsview, Ontario. Ms. Susan Smith, Head, Inventory Management; and Mr. Hugh Black, Head, Procurement Services, both of the Department of the Environment, Atmospheric Environment Service, Downsview, Ontario. Mr. T. Stevenson of J.W. Stevenson & Co. Ltd., Scarborough, Ontario.

A copy of the Preliminary Investigation Report was sent to DSS and the complainant for their comments. Both parties responded with written replies which were then exchanged between them. These comments have been added to the Preliminary Investigation Report and form part of the Investigation Report as submitted to the Board.

The Report of this investigation contains a number of appendices relating to material and documents deemed relevant by the Board's investigative staff as part of their Report. Specific reference is not made to these supporting documents in this determination, but they have been made available to the parties and, subject to the provisions of the *Access to Information Act*, are available to any other person.

Because the investigation produced sufficient information to enable the Board, in its opinion, to resolve the issues raised in this complaint, it was determined that an oral hearing was not required, nor was one

requested by either of the parties. The Board, in reaching its conclusions, has considered the complaint, the G.I.R., the complainant's response to the G.I.R., the Report of its investigative staff and the comments made thereon by the parties, and has made its findings and determinations on the basis of the facts disclosed therein, the relevant portions of which are mentioned in this determination.

### **The Procurement**

AES is a program within DOE. It is a recognized centre of expertise in meteorological equipment and, in addition to its regular program, it provides purchasing and warehousing services of certain meteorological products for the Department of National Defence.

In November 1991, an attempt was made by AES to procure Totex balloons on a "sole source no substitute basis". After trying to bid on this requirement and being denied in their efforts, Kaysam, through their lawyers, lodged a complaint against this procurement action on February 6, 1992. As a result, the government re-examined its need and a decision was made to open the requirement to solicitation again, this time on a competitive basis.

The new requirement was advertised in GBO and a Request for Proposal (RFP) dated March 18, 1992 with a closing date of 14:00 EST May 4, 1992 was prepared. Specifications provided by AES and referred to as Appendices A, B, and C, were attached to the RFP as part of the solicitation package. The following clause related to evaluation criteria was included in the RFP:

*A0005T 01/06/91*

*EVALUATION CRITERIA*

- |  |                   |
|--|-------------------|
| <i>1. PRICES</i>                             | <i>-MANDATORY</i> |
| <i>2. DELIVERY BY JULY 31, 1992.</i>         | <i>-MANDATORY</i> |
| <i>3. SPECIFICATION REQUIREMENT</i>          | <i>-MANDATORY</i> |
| <i>4. COMPLETION OF REQUEST FOR PROPOSAL</i> | <i>-MANDATORY</i> |
| <i>5. TECHNICAL LITERATURE</i>               | <i>-DESIRABLE</i> |
| <i>6. TEST SAMPLES PROVIDED UPON REQUEST</i> | <i>-MANDATORY</i> |
| <i>7. TRANSPORTATION COSTS</i>               | <i>-DESIRABLE</i> |

Three proposals were received: one from J.W. Stevenson & Co. Ltd., Scarborough, Ontario offering Totex balloons, (the eventual contract awardee); a second from Kaysam offering Kaysam balloons; and another from a third supplier. Each bidder submitted technical specifications with their proposal. DSS assembled the specifications of the products as submitted by all three bidders, and sent the package to AES by facsimile transmission on May 5, 1992 with the following notes on the cover sheet:

- *please evaluate for technical merit*
- *Note options of neck diameter for Kaysam ballons [sic]*
- *timely response for July 31,92 delivery*

According to the evaluation performed by AES, it was determined that Kaysam's bid was non-responsive for the following reasons: the Kaysam 100 gram balloon was "*rejected due to neck diameter*" and the Kaysam 300 gram and 450 gram balloons were acceptable in "*all points except 2*". These two points were described as:

*a) Recommended free lift. The amount of helium required to provide the average ascent rate would be an unacceptable cost increase in helium. See 450 gram balloon for cost analysis.*

*b) Neck size. Our SOW [Statement of Work] clearly states our neck size requirement of 3.0 cm.*

According to AES, the cost analysis referred to above was introduced in the evaluation of the bids when it was realized that the Kaysam balloon is larger than the Totex balloon. The RFP and attached specifications contain no reference to a cost-of-use comparison for helium, nor do they state what gas would be used in the balloons.

The technical evaluation concluded with the recommendation that "*the contract be awarded to the supplier of Totex balloons, as they meet the technical requirements of our SOW.*"

A DSS note to file indicates that "*AES CONFIRMED NECK SIZE WAS NEEDED AS 3.0CM DUE TO OPERATIONAL REQUIREMENTS... BASED ON THIS INFORMATION DAVE PLACED THE VERBAL ORDER WITH J.W. STEVENSON.*"

A further DSS note to file indicates that on June 2, 1992, Kaysam called requesting the status of the procurement. Kaysam was informed that a letter of regret had been sent and was then advised the reason their bid was found to be technically non-compliant was that they did not quote the neck diameter required. After further communication with DSS and AES, Kaysam was still not satisfied and filed the subject complaint with the Board.

## **Discussion**

When proposals are received in response to an RFP, the government has an obligation to evaluate them according to the methodology provided in the solicitation documents. Article 1305:2(c) of Chapter 13 of the Free Trade Agreement (FTA) states, in part, that the government shall "*use decision criteria in the qualification of potential suppliers, evaluation of bids and awarding of contracts, that...best meet the requirements in the tender documentation...and are clearly specified in advance.*"

The RFP in question contains detailed specifications with measurable design features of the products required. Some of these measurements have tolerances, some do not. The RFP also contains, inter alia, an evaluation criterion "*SPECIFICATION REQUIREMENT -- MANDATORY.*"

How does DSS view the term **mandatory**? Section 16 of the DSS Supply Policy Manual Directive 3002 states, in part:

*A bid will be considered non-responsive if...mandatory technical/performance requirements specified in the solicitation are not met.*

A note immediately following the above section states:

*Bids offering superior items will be evaluated only as meeting the stated requirement. Alternative or substitute products may be acceptable if the rules for offering and evaluating such alternatives have been specified in the solicitation document.*

The RFP contained no rules on the offering or evaluating of alternatives. Consequently, in order to be consistent with Article 1305:2(c) of the FTA stated previously, and given the categorization of the specification requirement as mandatory and the absence of any rules governing the evaluation of alternatives, the contracting officer had no discretion to accept a product that did not meet every design feature of the specification.

In their response to the G.I.R., Kaysam suggests the use of common industry practice as a criterion for proposal evaluation. Although this may be valid in circumstances where specific requirements are not stipulated, the Board is of the view that, where specific requirements are stipulated in an RFP, they override a practice that may be common to the industry. Indeed, the Ontario Court of Appeal in *Acme Building and Construction Ltd. v. Newcastle (Town)* ([1992] O.J. No. 1321) stated:

*In our opinion, even if there was acceptable evidence of custom and usage known to all the tendering parties, it could not prevail over the express language of the tender documents...*

In the same document, Kaysam also presents the position that the actions of the government in other procurements should have an effect on how the evaluation of the subject procurement is viewed. The Board is governed by the principle stated in section 17 of the FTAI Act:

*17. In considering a complaint, the Board shall be guided by and determine whether the requirements of Article 1305 of the Agreement and such other procedural requirements as are prescribed have been complied with in respect of the procurement that is the subject-matter of the complaint* (emphasis added).

According to the evaluation summary supplied to DSS by AES, the Kaysam bid was rejected for two reasons. One (applicable to all three sizes of balloon) was that the neck size offered did not correspond to the specification and the other (applicable to the 300 and 450 gram sizes) reason related to a calculation by AES showing the additional cost of helium to inflate the Kaysam vs. Totex balloons.

Kaysam contends in their complaint that:

*The cost evaluation performed by AES in respect of the 300 gram and 450 gram balloons which Kaysam offered was flawed in that it ignored relevant cost issues associated with the free lift, and had a fair evaluation been made, Kaysam should have been awarded the contract with respect to these balloons. Furthermore, after taking into account the alleged extra cost of hydrogen gas for the 300 gram and 450 gram balloons, Kaysam had still submitted the lowest bid in respect of the 450 gram balloon and in the aggregate.*

DSS contends in the G.I.R. that "*Kaysam's proposal bid was ruled non-responsive on the basis that it failed to meet the mandatory specifications stated in the solicitation, specifically the neck diameter of 3.0 cm.*" DSS's position is that the cost of use comparison was performed "[a]s an academic exercise" and was not used as a basis for eliminating Kaysam's bid.

The Board is of the view that the use of any cost comparison other than one of price offered would have been contrary to Article 1305:2(c) of the FTA that requires decision criteria used in the evaluation of bids to be clearly specified in advance.

In their proposal, Kaysam provided detailed specifications of three balloons. There has been no argument on the part of Kaysam that DSS had reached the wrong conclusion in finding that, with respect to the 100 gram size, Kaysam's bid was non-responsive. The proposal was offering a 100 gram balloon with a neck size of 3.5 cm. + or - .3 cm. while the RFP required a neck diameter of 1.4 cm + or - .3 cm.

The issue that is in dispute is the nature of Kaysam's offer of 300 and 450 gram balloons. Kaysam's proposal stated, in part, for the 300 gram size:

<i>Neck diameter *</i>	<i>1 9/16 ± 3/16</i>	<i>4.0 ± 0.5</i>
<i>(Integral neck)</i>	<i>inches</i>	<i>cms.*</i>

The following note is found at the bottom of that page:

*\* Also available in attached necks of 2.5 cms. and 3.2 cms.*



For the 450 gram size the proposal stated, in part:

<i>Neck diameter *</i>	$1 \frac{9}{16} \pm \frac{3}{16}$	$4.0 \pm 0.5$
<i>(attached neck)</i>	<i>inches</i>	<i>cms.*</i>

The following note is found at the bottom of that page:

*\* Also available in 2.5 cms. and 3.2 cms.*

Kaysam, in its complaint and subsequent submissions to the Board, contends that the neck diameter of their proposed product deviates from the specification by only 2 mm. This contention assumes that the proposal submitted by Kaysam legitimately offers an optional balloon with a 3.2 cm neck diameter. On this point, DSS, in their comments on the Board's Preliminary Investigation Report, states:

*the options of neck diameter, "also available in 2.5 cm and 3.2 cm" made by Kaysam was a single notation made at the bottom of the proposal with no additional financial or other information...The evaluation was completed on the basis of information included in the proposals received prior to bid closing. The options offered by Kaysam were not considered for award since no pricing details were provided. The government did not seek additional pricing information on the options available from Kaysam since the acceptance of this information after bid closing would have provided an unfair advantage to Kaysam and is not in accordance with our policy.*

The Board takes the view that, because of the way the RFP was written, the only acceptable proposal would have been one offering a neck diameter of 3.0 cm.

In conclusion, the Board finds that the complainant was not unfairly treated in the evaluation of its bid. The government's declaration of Kaysam's bid as non-responsive was consistent with the requirements of section 17 of the FTAI Act given the circumstances surrounding the specifications. It is on this basis that the Board determines, pursuant to section 33 of the Regulations, that there is no valid basis for the complaint and it is, therefore, dismissed. Furthermore, as stated earlier, Kaysam's

allegation that the specifications worked to defeat their efforts to respond to and participate openly and competitively in the tendering and bidding phase relates to a complaint that was not filed in a timely fashion in accordance with the requirements of section 23 of the Regulations. Finally, since the Board has determined that Kaysam's complaint should be dismissed for the reasons set out herein, the Board will not address any other issue pertaining to this procurement which is not relevant to this determination.

**DETERMINATION**

The Board has determined, on the basis of its investigation, that no valid basis for this complaint exists and, pursuant to section 33 of the Procurement Review Board Regulations, it hereby dismisses the complaint.

**J. Craig Oliver**

**J. Craig Oliver**

**Chairman**

**Procurement Review Board of Canada**