



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2011-012

Supremex Inc.

*Decision made  
Wednesday, June 22, 2011*

*Decision and reasons issued  
Wednesday, July 6, 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**

**SUPREMEX 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.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

Gillian Burnett  
Gillian Burnett  
Acting 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. EN893-104289/A) by the Department of Public Works and Government Services (PWGSC) for the manufacture and printing of double-window envelopes.
3. In its complaint Supremex Inc. (Supremex) alleged:
  - that its bid was incorrectly evaluated and improperly declared non-compliant; and
  - that PWGSC awarded a contract to a bidder that did not have the capacity to complete the work.
4. 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 Fourteen of the *Canada-Peru Free Trade Agreement*<sup>7</sup> applies.<sup>8</sup> In other words, the Tribunal must examine the complaint to determine if there is a reasonable indication that the procuring entity conducted the procurement in a manner that violated one of the applicable trade agreements.

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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 supply of envelopes and printing services are covered by the *AIT*. Although the supply of envelopes is covered by *NAFTA*, the *CCFTA*, the *CPFTA* and the *AGP*, printing services under Category T, “Communications, Photographic, Mapping, Printing and Publications Services”, are excluded from *NAFTA* per Annex 1001.1b-2, from the *CCFTA* per Annex Kbis-01.1-4 and from the *CPFTA* per Annex 1401.1-4 and are not listed under Appendix I, Annex 4 of the *AGP*. However, as the Tribunal is satisfied that this procurement is covered by the *AIT* and the Tribunal has decided not to conduct an inquiry into this complaint, it does not consider it necessary to determine whether *NAFTA*, the *CCFTA*, the *CPFTA* and the *AGP* are applicable in this case.

5. 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.”

### Evaluation of Supremex’s Proposal

6. PWGSC issued a Request for Proposal (RFP) for the manufacture and printing of envelopes, with a bid closing date of March 18, 2011.

7. On March 16, 2011, PWGSC issued amendment No. 001, which extended the bid closing date to March 22, 2011.

8. With respect to the mandatory technical criteria, section 1.1.1 of “**PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION**” of the RFP lists the sole criterion. It provides as follows:

#### M.1 Corporate Experience

The bidder *must* identify two (2) projects for which the bidder was under contract to manufacture and print, per year, a minimum volume each year of 500,000 double-window envelopes for each contract within the last three (3) calendar years prior to the closing date of this Request for Proposal (RFP).

#### Response Format

The bidder *must* provide the following information for each contract:

- Contact information of the client(s) identified to meet M.1;
- The start and end date of the contract (example: March 2007 to present or April 2009 to March 10, 2010);
- A description of the double-window envelopes provided under the contract(s);
- The quantity of double window envelopes provided under the contract(s).

[Emphasis added]

9. The “**Basis of Selection**”, which is found in the same part, indicates that “[a] bid *must* comply with the requirements of the bid solicitation and *meet the mandatory technical evaluation criterion* to be declared responsive.” [Emphasis added]

10. The Tribunal finds that the requirement to demonstrate corporate experience by providing client contact information, contract start and end dates, and descriptions and quantities of envelopes in relation to the two projects identified by the bidder was clear and unambiguous.

11. The Tribunal notes that Supremex indicated in its bid that it “. . . has been the supplier of these two envelopes to PWGSC for over 30 years . . .” and that it “. . . currently manufacture[s] Double Window envelopes to many of Canada’s top companies . . .”<sup>9</sup> However, it is not in dispute that the bid submitted by Supremex did not provide the specific information required by mandatory requirement M.1 in respect of corporate experience (i.e. client contact information, contract start and end dates, envelope descriptions and the quantity of envelopes provided).

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9. Public complaint, tab 3.

12. Bidding closed on March 22, 2011. Later that day, PWGSC requested, by e-mail, that Supremex indicate where, in its proposal, “. . . the information regarding contact information, start and end dates, description and quantities” could be found. On March 23, 2011, Supremex replied to PWGSC’s e-mail of March 22, 2011, and provided additional information, which was not contained in its bid. The Tribunal notes that, in that same e-mail, Supremex stated as follows:<sup>10</sup>

In my haste to get our RFP to our courier on Monday at noon, *I completely missed the contact info, start and end dates, description & quantities* – although I did state the names of the organizations that we currently sell Double Windows to within our Technical Bid and I did reference that we are, and have been the incumbent for over 30 years, on the envelopes within this RFP.

*Here is the extra information that you require.*

. . .

I apologize for my *omission* . . . .

[Emphasis added]

13. On March 25, 2011, PWGSC sent an e-mail to Supremex advising it that its bid did not comply with mandatory requirement M.1 and had been disqualified from further consideration. In that same e-mail, PWGSC informed Supremex that the contract had been awarded to Enveloppe Concept Inc. (ECI).

14. In its complaint, Supremex argued that its bid clearly and unambiguously demonstrated its ability to meet the material terms of the RFP. Supremex noted that Charron J., in *Double N Earthmovers Ltd. v. Edmonton (City)*,<sup>11</sup> stated that “[t]he test for compliance in the tendering process is ‘substantial’ rather than strict” and that “[s]ubstantial compliance requires that *all material conditions* of a tender, *determined on an objective standard, be complied with . . . .*” [Emphasis added]

15. In the same vein, the Tribunal, in *IBM Canada Ltd.*,<sup>12</sup> stated that procuring entities must evaluate bidders’ conformance with mandatory requirements thoroughly and strictly, indicating, however, that there could be exceptions for matters of form over substance and that, “[w]hile bids must be read strictly, in the absence of a clear format for providing information, in the opinion of the Tribunal, some latitude must be given to bidders.”<sup>13</sup>

16. In this regard, the Tribunal is of the view that the particulars of claimed corporate experience (i.e. client contact information, contract start and end dates, and information relating to the description and quantities of the envelopes provided under the identified contracts) as required by mandatory requirement M.1 are all “material” since they bear directly upon the nature and verifiability of the corporate experience claimed by a bidder in purported fulfillment of a mandatory requirement of the solicitation.

17. Given its material nature, Supremex’s failure to provide the required information in respect of corporate experience in its bid cannot be dismissed as a deficiency of form, but rather, must be considered one of substance. The Tribunal therefore finds that PWGSC’s determination that Supremex’s proposal did not comply with the requirements of the RFP was correct.

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10. *Ibid.*, tab 4.

11. [2007] 1 S.C.R. 116 at paras. 109, 110.

12. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT).

13. *Ibid.* at 7.

18. The Tribunal also finds that the information relating to past contracts with PWGSC and a second client, which Supremex sought to provide to PWGSC on March 23, 2011, after bid closing, was properly rejected by PWGSC. The acceptance of this information would have amounted to an improper modification of Supremex's proposal after the deadline for the receipt of bids had passed. In this regard, a distinction must be drawn between the legitimate clarification (i.e. explanation) of some existing aspect of a proposal and the revision or modification of a proposal through the introduction of new or different substantive information.

19. The Tribunal therefore finds that the complaint does not disclose a reasonable indication that PWGSC's evaluation of Supremex's bid was not in accordance with the requirements of the RFP and the applicable trade agreements.

### **Awarding of Contract to ECI**

20. Supremex also contends, on the basis of information extraneous to the immediate solicitation, that PWGSC should have disqualified ECI because it knew or ought to have known that ECI did not have the capacity to perform the work described in the statement of work of the RFP. Supremex alleges that PWGSC knew or ought to have known that ECI was suspended from supplying further envelopes to the Canada Revenue Agency because of its repeated failure to meet delivery deadlines.

21. As noted by Supremex, the RFP incorporated, by reference, article 12 of PWGSC's "2003 Standard Instructions – Goods or Services – Competitive Requirements (2010-10-07)",<sup>14</sup> which provides as follows:

#### **12 Rejection of Bid**

1. Canada *may* reject a bid where any of the following circumstances is present:

...

(c) with respect to current or prior transactions with the Government of Canada

...

(iii) *Canada has exercised its contractual remedies of suspension or termination for default with respect to a contract with the Bidder, any of its employees or any subcontractor included as part of the bid;*

...

[Emphasis added]

22. The Tribunal is of the view that the language of this provision is discretionary and does not compel PWGSC to reject a bid because of the bidder's default on a current or prior contract. In this regard, it is conceivable, for example, that PWGSC, in the exercise of its discretion under this provision, might choose to accept a bid notwithstanding prior default by the bidder, being satisfied that the factors that may have led or contributed to that default have since been addressed, thereby rendering the vendor viable as a potential supplier. The Tribunal is of the view that it would not be appropriate for it to directly or indirectly impinge upon PWGSC's discretion under this article.

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14. <http://ccua-sacc.tpsgc-pwgsc.gc.ca/pub/rqqr.do?lang=eng&id=2003&date=2010-10-07&eid=5>.

23. Other than a reference to Supremex's understanding that ECI was suspended from further supplying envelopes to the Canada Revenue Agency for its failure to respect delivery deadlines, no other evidence was presented with respect to the compliance of ECI's proposal with the requirements of the solicitation.<sup>15</sup>

24. The Tribunal therefore finds that the complaint does not disclose a reasonable indication that the evaluation of ECI's proposal was not carried out in accordance with the requirements of the RFP and applicable trade agreements.

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.

Pasquale Michaele Saroli  
Pasquale Michaele Saroli  
Presiding Member

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15. Public complaint at para. 55.