



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-031

Bell Canada

*Decision made
Monday, September 26, 2011*

*Decision issued
Friday, October 7, 2011*

*Reasons issued
Monday, October 24, 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

BELL CANADA

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

The statement of reasons will be issued at a later date.

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. EN869-090126/O) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Human Resources and Skills Development and the Department of Citizenship and Immigration for the provision of an integrated telecommunications service to deliver voice, data and video services, i.e. the Government Enterprise Network Services (GENS).

3. Bell Canada (Bell) alleged that PWGSC erred in disqualifying the four proposals that it submitted in response to the Request for Proposal (RFP), in that:

- PWGSC's determination that the signature of a Bell executive, Mr. Stéphane Boisvert, on the bidder certification at Annex E to the RFP renders the four proposals non-compliant is incorrect in fact and law; and
- PWGSC misapplied the terms of the RFP by treating the certification at Annex E to the RFP as a mandatory requirement, despite the fact that it was not intended as such under the plain language of the RFP.

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

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

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*,³ Chapter Five of the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁶ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*⁷ or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁸ applies. At a minimum, the *AIT* applies to this procurement.⁹

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.”

6. Thus, the issue is whether the complaint discloses a reasonable indication that PWGSC failed to evaluate Bell’s bids in accordance with the requirements of the RFP.

7. The RFP stated the following:

PART 3 – BID PREPARATION INSTRUCTIONS

...

3.2 Section 1: Technical Bid

... The technical bid should address clearly and in sufficient depth the points that are subject to the evaluation criteria against which the bid will be evaluated. ...

...

(a) **The technical bid consists of the following:**

...

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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> [*AIT*].
 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) [*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. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011) [*CCOFTA*].
 9. The services appear to fall under a category relating to telecommunications services. Some telecommunications services are excluded from some of the trade agreements. While the applicability of *NAFTA*, the *CCFTA*, the *CPFTA* and the *AGP* are unclear from the information provided in the complaint, the Tribunal has taken into account the *AIT* for purposes of making a determination pursuant to subsection 30.13(1) of the *CITT Act*. This should not, in any way, be interpreted to mean that the Tribunal has made a determination that the procured services are not covered by *NAFTA*, the *CCFTA*, the *CPFTA* and the *AGP*. Additionally, the Tribunal notes that the *CCOFTA* had not yet entered into force when the solicitation in question was issued. As such, the *CCOFTA* does not apply.

- (ii) GENS Annex E – Bidder Certification;

...

PART 4 – EVALUATION PROCEDURES AND BASIS OF SELECTION

...

4.2 Evaluation Procedures

- (a) Bids will be assessed in accordance with the entire requirement of the bid solicitation including the mandatory, technical and financial evaluation criteria. . . .

...

- (c) In addition to any other time periods established in the bid solicitation:

- (i) Requests for Clarifications: If Canada seeks clarification or verification from the Bidder about its bid, the Bidder will have

4.3 Mandatory Evaluation

- (a) Each bid will be reviewed to determine whether it meets the mandatory requirements of the bid solicitation. All elements of the bid solicitation that are mandatory requirements are identified specifically with the words “must” or “mandatory”. Bids that do not comply with each and every mandatory requirement will be considered non-responsive and disqualified.

...

4.6 Basis of Selection

- (a) A bid must comply with the requirements of the bid solicitation and meet all mandatory evaluation criteria to be declared responsive. Bids not meeting this requirement will be declared non-responsive. . . .

...

PART 6 – CERTIFICATIONS

Bidders must provide the required certifications to be awarded a contract. Canada will declare a bid non-responsive if the required certifications are not completed and submitted in accordance with the articles below.

Compliance with the certifications Bidders provide to Canada is subject to verification by Canada during the bid evaluation period (before award of a contract) and after award of a contract. The Contracting Authority will have the right to ask for additional information to verify Bidders’ compliance with the certifications before award of a contract. The bid will be declared non-responsive if any certification made by the Bidder is untrue, whether made knowingly or unknowingly. Failure to comply with the certifications . . . will also render the bid non-responsive.

6.1 Certifications Precedent to Contract Award

- (a) The certifications listed below, in 6.2, 6.3, and 6.4, should be completed and submitted with the bid, but may be submitted afterwards. If any of these required certifications is not completed and submitted as requested, the Contracting Authority will so inform the Bidder and provide the Bidder with a time frame within which to meet the requirement. . . .

6.2 OEM Certification

...

6.3 Software Publisher Certification and Software Publisher Authorization

...

6.4 Certifications Required by Supplemental Standard Instructions 2003-1

...

8. On May 31, 2011, Bell submitted four bids in response to the RFP.
9. In a letter dated August 19, 2011, PWGSC advised Bell that its bids did not comply with a bid validity requirement indicated in Annex E to the RFP, "BIDDER CERTIFICATION", which requires the signature of the bidder's Chief Executive Officer. PWGSC noted that Annex E was signed by Mr. Stéphane Boisvert and that the bids identified Mr. Boisvert as the President of Bell Business Markets, not as the Chief Executive Officer of Bell Canada.
10. In a letter dated August 29, 2011, Bell objected to PWGSC. Bell advised PWGSC that, pursuant to a delegation instrument signed by its Chief Executive Officer, dated May 16, 2011, prior to bid closing, Mr. Boisvert had full corporate authority to approve and sign the proposals on behalf of the Chief Executive Officer. According to the letter, Mr. Boisvert had signed Annex E to the RFP without reference to his other title by design and in contrast to other places in the bids because he acted in the capacity of Chief Executive Officer for the purposes of Annex E. Bell alleged that PWGSC incorrectly inferred that Mr. Boisvert's signature in Annex E was made on the basis of the same title or office without checking or confirming with Bell and that "PWGSC should have clarified with Bell Canada, under paragraphs 4.2 and 6 of the RFP, whether Mr. Boisvert had been given the actual authority to execute Annex E as the legal delegate of Bell Canada's Chief Executive Officer" [footnote omitted].¹⁰
11. Through the same letter, Bell also objected to the disqualification of the bids on the basis that the certification in Annex E to the RFP and Annex E itself were not identified as mandatory requirements of the bid solicitation. The letter noted that paragraph 4.3(a) of the RFP identified mandatory requirements with the words "must" or "mandatory" and that nowhere in the RFP in relation to Annex E or in Annex E itself are the words "must" or "mandatory" used. Bell also argued that paragraph 3.6(a) provides as follows: "Bidders must submit the certifications required under Part 6." Bell argued that Annex E is not one of the certifications listed under Part 6.
12. In a letter dated September 9, 2011, PWGSC advised Bell that its decision communicated in a letter dated August 19, 2011, remained unchanged. PWGSC noted that Bell had not indicated in its bids that Mr. Boisvert had authority to execute Annex E to the RFP on behalf of, for or with the authority of the Chief Executive Officer of Bell. PWGSC indicated that, at the initial Solicitation of Interest and Qualification stage, Bell's response had identified the Chief Executive Officer as Mr. George Cope and that the individual who signed Annex E was clearly identified in the bids as "President – Bell Business Markets". PWGSC added that it was not permitted to seek additional information in order to correct errors or rectify shortcomings in a bid.
13. In the same letter, PWGSC acknowledged that Annex E to the RFP is not a certification required under Part 6 of the RFP. It also acknowledged that Annex E was not a "mandatory requirement" within the meaning of article 4.3. However, PWGSC took the position that article 4.3 had no application because Annex E forms a fundamental requirement for validation of the bid. In this respect, PWGSC referred Bell to paragraph 4.6(a), which, in its view, distinguishes between "requirements of the bid solicitation" and "mandatory evaluation criteria" and provides that a bid must comply with both to be declared responsive.
14. On September 20, 2011, Bell filed its complaint with the Tribunal in a timely fashion.

10. Complaint, tab E.

15. In its complaint, Bell submitted that, in evaluating the bids, PWGSC's evaluators did not turn their minds to the possibility that Mr. Boisvert was acting in the capacity of Chief Executive Officer or that Mr. Boisvert possessed different corporate capacities when it came to executing documents. Bell submitted that the evaluators leapt to erroneous conclusions when they considered Mr. Boisvert's capacity to sign Annex E to the RFP. According to Bell, PWGSC should have sought clarification from Bell before disqualifying its bids, and such clarification would not have constituted improper bid repair.

16. Bell further submitted to the Tribunal that, in any event, the certification in Annex E to the RFP was not intended to be a mandatory requirement of the bid solicitation and that, therefore, the omission of the Chief Executive Officer's signature was not a proper basis for rejecting the bids. According to Bell, the certifications listed in Part 6 of the RFP were the mandatory certifications and the certification at Annex E was not among them. Bell also submitted that the signature in Annex E was not a mandatory requirement, on the basis that subparagraph 3.2(a)(ii) indicated that Annex E formed part of the technical bid, rather than a mandatory requirement, and that paragraph 4.3(a) stated that "[a]ll elements of the bid solicitation that are mandatory requirements are identified specifically with the words 'must' or 'mandatory'."

17. Bell also claimed that, if there was non-compliance with a mandatory requirement, the non-compliance was "trivial" and the bids were substantially compliant.

Tribunal's Analysis

18. Annex E to the RFP consists of a form whereby, among others, a signatory on behalf of the bidder confirms that he or she has read the entire bid solicitation and certifies that all the information provided in the bid is complete and accurate, and that the bidder agrees to be bound by the conditions of the bid solicitation and the resulting contract. The form has a signature box at the bottom right and to its left is the following stipulation:

Signature of Authorized Representative of Bidder, it is *required* that this signature be the Chief Executive Office

[Emphasis added]

19. Bell's argument that the Chief Executive Officer's signature was not an essential criterion seems to focus on the wording of article 4.3 of the RFP. Article 4.3 indicates that mandatory requirements are identified by the words "must" or "mandatory"—words that are absent from Annex E to the RFP.

20. Article 4.3 of the RFP is entitled "**Mandatory Evaluation**", which implies that the "mandatory requirements" referred to in that article are specifically mandatory evaluation criteria.

21. This is consistent with article 4.6 of the RFP, "**Basis of Selection**", which states the following:

A bid must comply with the requirements of the bid solicitation and meet all mandatory evaluation criteria to be declared responsive.

[Emphasis added]

22. This preceding wording clearly indicates that there are two categories of information that must be provided in a bid in order for it to be declared responsive: (i) the requirements of the bid solicitation; and (ii) the mandatory evaluation criteria.

23. As well, paragraph 4.2(a) of the RFP indicates that bids will be assessed in accordance with “. . . the entire requirement of the bid solicitation including the mandatory, technical and financial evaluation criteria. . . .” This wording confirms that the mandatory evaluation criteria are just some of the elements of the RFP with which a bid must comply to be declared responsive.

24. Thus, even though Annex E to the RFP does not include either the word “must” or the word “mandatory”, it may nonetheless be an essential element of a bid under the terms of the RFP if it constitutes one of the “requirements of the bid solicitation”, in accordance with article 4.6.

25. While Annex E to the RFP does not appear to constitute a mandatory evaluation criteria as defined in article 4.3 of the RFP, it does clearly form part of the bid solicitation (i.e. the RFP), and the signature of the bidder’s Chief Executive Officer is expressly “required”, as the text in Annex E to the RFP provides as follows: “**Signature of the Authorized Representative of Bidder, it is *required* that this signature be the Chief Executive Officer**” [emphasis added].

26. Therefore, the Tribunal finds that the Chief Executive Officer’s signature in Annex E to the RFP constitutes one of the “requirements of the bid solicitation” with which a bidder had to comply in order for its bid to have been declared responsive to the RFP, in accordance with article 4.6 of the RFP.

27. Although Bell has argued that its bids are substantially compliant with the RFP and should not be disqualified on any “trivial” ground or on the basis of a “mere irregularity”, in cases of conformance with essential criteria, the Tribunal has previously found that the test is one of strict compliance.¹¹ The Tribunal finds that the Chief Executive Officer’s signature is substantive in the context of the RFP, it certifies the validity of the information contained in the bid and confirms the acceptance of the terms and conditions of the bid solicitation and resulting contract. Given that the Chief Executive Officer’s signature was required and therefore necessary for the bids to be declared responsive to the RFP as per article 4.6 of the RFP, PWGSC had a duty to ensure that Bell’s bids thoroughly and strictly complied with this requirement.

28. For its part, Bell had the onus to meet the requirement of Annex E to the RFP and ensure that the information submitted as part of its bid was clear.¹²

29. In other words, it was incumbent on Bell to ensure that its bid clearly and strictly met the requirement of Annex E to the RFP, and it was incumbent on PWGSC to evaluate Bell’s conformance with the requirement of Annex E thoroughly and strictly.

30. Bell admits that its Chief Executive Officer, Mr. George Cope, did not sign Annex E to the RFP. Bell also admits that Annex E was signed instead by Mr. Boisvert. Bell argues that, nonetheless, Annex E was properly executed because Mr. Boisvert was authorized to sign Annex E on behalf of the Chief Executive Officer.

11. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA). In that case, the Federal Court of Appeal recognized that ensuring compliance by potential suppliers with all mandatory requirements of solicitation documents was one of the cornerstones of the integrity of any tendering system.

12. For the principle that a bidder bears the onus to meet the requirements of a solicitation, see, for example, *Re Complaint Filed by Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Re Complaint Filed by Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *Re Complaint Filed by WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT). For the principle that a bidder bears the onus to ensure that its bid is clear, see *Re Complaint Filed by Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT).

31. The Tribunal finds that, on the face of the bids, Mr. Boisvert was not the Chief Executive Officer. While Mr. Boisvert's title is not indicated in Annex E to the RFP, he is clearly identified elsewhere in the bids as "President – Bell Business Markets". The only reasonable conclusion to which PWGSC could have come in these circumstances is that Mr. Boisvert was not the Chief Executive Officer and that, therefore, Bell had not complied with the requirement of Annex E.

32. The circumstances of this case are analogous to those in File No. PR-2007-011.¹³ The complainant in that case had its bid rejected because it had failed to submit the requisite signature. The bidder complained that this was a "minor irregularity", but the RFP indicated that the signature was necessary for the bid to be compliant, and the Tribunal found no reasonable indication that PWGSC had failed to meet its relevant obligations by declaring the bids non-responsive. On judicial review, the Federal Court of Appeal upheld the Tribunal's decision that the signature was mandatory and that "... the necessary implication which flows from [the Tribunal's] conclusion [was] that the CITT did not consider the absence of a signature to be a minor irregularity."¹⁴

33. In this case, there is a signature, but, on the face of the bids, it is not the required signature. Given that the required signature was essential for Bell's bids to be declared responsive to the bid solicitation, the Tribunal does not consider its absence to be a minor irregularity. Rather, it was a substantive requirement of the RFP with which Bell failed to comply and the reason for which PWGSC justifiably declared the bids non-responsive.

34. Bell argued that Mr. Boisvert was authorized to sign on behalf of the Chief Executive Officer. However, the Tribunal finds that the information submitted with Bell's bids did not indicate that. In fact, read in their entirety, the bids, as submitted, indicated that Mr. Boisvert was the President of Bell Business Markets and not the Chief Executive Officer of Bell.

35. Considering the information that PWGSC had before it, the Tribunal finds that there is no reasonable indication that PWGSC improperly evaluated Bell's bids with respect to Annex E to the RFP.

36. Turning to the matter of clarification, a procuring entity may, in some circumstances, seek clarification of a particular aspect of a proposal, but it is generally not under any obligation to do so.¹⁵

37. In the present case, Part 6 of the RFP, upon which Bell relied in part,¹⁶ did give PWGSC "... the right to ask for additional information to verify Bidders' compliance with the certifications ... " during the bid evaluation period before award of a contract. However, it does not indicate that PWGSC had an obligation to seek clarification.

38. In addition, paragraph 4.2(c) of the RFP refers to requests for clarification without indicating that such requests are anything other than discretionary.

13. *Re Complaint Filed by Surespan Construction Ltd.* (8 May 2007) (CITT).

14. *Surespan Construction Ltd. v. Canada (Attorney General)*, 2008 FCA 57 (CanLII) at para.2.

15. *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT).

16. Bell contended that Annex E to the RFP was not a certification covered by Part 6, which PWGSC did not dispute, but nevertheless it relied in part upon this article in its complaint to the Tribunal.

39. Also, Part 2 of the RFP incorporated, by reference, article 16 of PWGSC's "2003 Standard Instructions – Goods or Services – Competitive Requirements (2010-10-07)",¹⁷ which provides as follows:

16 Conduct of Evaluation

1. In conducting its evaluation of the bids, Canada may, but will have no obligation to, do the following:
 - (a) seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation;

...

40. Moreover, as the Tribunal has indicated previously, a clarification is an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.¹⁸ Clarification of an ambiguity in a bid, rather than a substantive change to a bid, would be acceptable.¹⁹ However, on the face of the bids, Mr. Boisvert was clearly not the Chief Executive Officer.

41. Therefore, the Tribunal finds that PWGSC was under no obligation to seek clarifications from Bell with respect to Annex E to the RFP and, specifically, on the required signature of the Chief Executive Officer.

42. For all the reasons above, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with Article 506(6) or any other provision of the *AIT*.

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

DECISION

44. 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

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

18. *Re Complaint Filed by Mechtron Energy Ltd.* (18 August 1995), PR-95-001 (CITT).

19. *Re Complaint Filed by Bosik Vehicle Barriers Ltd.* (6 May 2004), PR-2003-082 (CITT).