



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-024

The Masha Krupp Translation
Group Limited

*Decision made
Thursday, August 25, 2011*

*Decision and reasons issued
Friday, September 23, 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

THE MASHA KRUPP TRANSLATION GROUP LIMITED

AGAINST

THE DEPARTMENT OF FISHERIES AND OCEANS

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.

Stephen A. Leach

Stephen A. Leach
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 (FP802-110045) by the Department of Fisheries and Oceans (DFO) for the provision of translation and editing services in English and French.
3. The Masha Krupp Translation Group Limited (MKTG) alleges that DFO unjustly and unreasonably rejected its offer in response to the Request for a Standing Offer (RFSO). In particular, MKTG alleges that its offer was evaluated in a manner that was inconsistent with the solicitation documents and Canada's obligations under the applicable trade agreements. MKTG also alleges that certain mandatory requirements of the RFSO were ambiguous and that DFO erred in rejecting MKTG's proposal on the basis of non-compliance with mandatory requirements that were either not specifically set out or vague in terms of what would constitute compliance.
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. 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. In this case, only the *AIT* applies.⁹
5. On May 18, 2011, DFO issued the RFSO. The deadline for the receipt of bids was June 28, 2011.

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> [*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. Translation services are covered by the *AIT*. The services appear to fall under Category R109 "Translation and Interpreting Services (inc. sign language)". The services under Category R109 are excluded from *NAFTA* per Annex 1001.1b-2, from the *CCFTA* per Annex Kbis-01.1-4, from the *CPFTA* per Annex 1401.1-4 and from the *CCOFTA* per Annex 1401-4. Translation services are not covered under Appendix I, Annex 4 to the *AGP*.

6. Section 1, “Contractor Instructions and Information”, of the RFSO provides as follows:

1.5 STANDARD INSTRUCTIONS, CLAUSES AND CONDITIONS

...

03 Submission of Bids

...

2. It is the Contractor’s responsibility to:
- (a) obtain clarification of any terms, conditions or technical requirements contained in the solicitation;
 - (b) prepare its bid in accordance with the instructions contained in the bid solicitation;

...

11 Conduct of Evaluation

In conducting its evaluation of the bids, Canada may, but will have no obligation to, do the following:

- (a) seek clarification or verification from Contractors regarding any or all information provided by them with respect to the bid solicitation;

...

1.9 AMENDMENTS TO CONTRACTOR’S PROPOSAL

Notwithstanding the Rights of Canada, amendments to the Contractor’s proposal will not be accepted after the RFSO closing date and time.

7. Section 2, “Evaluation and Selection”, of the RFSO provides as follows:

2.1.1 Proposals will be evaluated in accordance with the evaluation criteria identified in ANNEXES C and D and in conjunction with the Statement of Work (SOW) – ANNEX A. Contractors are encouraged to address these criteria in sufficient depth in their proposals to permit a full evaluation of their proposals. The onus is on the Contractor to demonstrate that it meets the requirements specified in the solicitation.

8. Annex C, “Mandatory Evaluation Criteria”, of the RFSO provides as follows:

2.2.2 Quality Reviewers

The Contractor must staff quality reviewers to review and approve the translated or edited text. The quality reviewers must have worked in a translation quality assurance area with at least 3 years of work experience and have a degree from a recognized university with acceptable specialization in Translation (in English or French). The Contractor must complete the “Quality Reviewer Profile” (Form C-2 to Annex C) for each proposed quality reviewer who will be handling DFO translation and editing requirements.

9. Form C-2, “Quality Reviewer Profile”, contains the following particulars:

Quality reviewer’s Name

Name of University and Degree/Designation

Primary Branch of Study (Note: DFO reserves the right to request proof of the degree/designation)

Name of the company(ies) where the reviewer has accumulated work experience in quality assurance

Briefly describe how the duties the reviewer performs in this(these) position(s) relate to the experience qualification requested.

Identify a supervisor (name and telephone number) who can validate the experience with respect to this qualification.

10. On August 3, 2011, DFO advised MKTG that it would not be issued a standing offer, as its proposal was deemed non-compliant. Specifically, DFO advised that, on Form C-2, MKTG failed to indicate the number of years of experience for one of the proposed quality reviewers and that, for another proposed quality reviewer, MKTG failed to indicate a degree from a recognized university with acceptable specialization in translation (in English or French).

11. On August 4, 2011, MKTG advised that it did not agree with DFO's assessment and requested an in-person debriefing. On August 8, 2011, DFO offered MKTG a telephone debriefing and provided additional information relative to the evaluation process. On August 10, 2011, MKTG e-mailed DFO again to request an in-person debriefing and provided a letter of objection that outlined its concerns with respect to its disqualification. On August 16, 2011, DFO sent an e-mail outlining its position relative to the findings of the evaluation team. On August 17, 2011, the debriefing was held, and DFO maintained its position relative to the evaluation and disqualification of MKTG's proposal.

12. On August 22, 2011, MKTG filed its complaint with the Tribunal.

13. Article 506(6) of the *AIT* provides as follows: "The 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."

14. With respect to the lack of years of experience, MKTG submits that there was no column entitled "Years of Experience" on Form C-2. MKTG states that it would not have proposed the individual if he had not met the requirement relating to the years of experience. In MKTG's view, if DFO required a contractor to specifically indicate the years of experience for the quality reviewers listed, it ought to have included that requirement in the field titles on Form C-2. MKTG further submits that Form C-2 was ambiguous and that any ambiguity on the form should be interpreted in its favour.

15. With respect to the university degree of the other proposed quality reviewer, MKTG submits that a quality reviewer was required to have an acceptable specialization in translation, but the RFSO did not indicate any determinative criteria that outlined what would be considered acceptable. It submits that, when the proposed quality reviewer attended university, no specialty called "translation" was offered. It submits that, in the absence of any detail surrounding what would be considered an "acceptable" specialization, it was entirely reasonable and legitimate for MKTG to expect and assume that the proposed individual's education qualifications would be considered acceptable.

16. In previous decisions, the Tribunal has made it clear that suppliers bear the onus to respond to and meet the mandatory criteria set out in a solicitation. The Tribunal has also made it clear that the bidder bears the onus to seek clarification before submitting an offer and that it will not substitute its judgement 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.¹⁰ In this case, for the reasons discussed below, the Tribunal finds that these circumstances are not present and that DFO's interpretation and application of the relevant mandatory requirements were reasonable and fair.

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

17. The Tribunal is of the view that mandatory requirement 2.2.2 is clear and adequately details the information required in order for an offer to be compliant with the criterion. This includes a requirement for quality reviewers to have a minimum of three years of experience and a degree from a recognized university with acceptable specialization in translation (in English or French). Even if Form C-2 did not precisely include a column or a field in which to indicate the years of experience, the mandatory criteria, read in their entirety, clearly indicated that this information was needed and would be used in the evaluation of offers. Bidders had the onus to demonstrate compliance with this requirement in their proposals and could do so in describing their work experience on Form C-2. The Tribunal finds that MKTG's proposal failed to include the required information for one of the proposed resources and that, as a result, DFO's conclusion that MKTG's proposal did not demonstrate compliance with this requirement was reasonable. The Tribunal therefore concludes that the complaint in this regard does not disclose a reasonable indication that MKTG's proposal was evaluated in a manner that violated the provisions of the *AIT* or that was inconsistent with the requirements of the solicitation documents.

18. With respect to the criterion concerning the requisite university degree with an acceptable specialization in translation (in English or French), the Tribunal notes MKTG's argument that its proposed resource attended university at a time when, according to MKTG, no specialty called "translation" was offered. However, the Tribunal is of the view that this did not relieve MKTG of having to meet the mandatory requirement that the proposed resource have a university degree with an acceptable specialization in translation, specifically in English or French. Irrespective of the meaning of the terms "acceptable specialization", the Tribunal considers that the solicitation documents clearly required bidders, at the very least, to propose resources with a university degree that plainly featured the French or English language as an area of study. In other words, bidders clearly had the onus to demonstrate that their proposed quality reviewers' university degrees included a specialization in an area of study that included French or English.

19. In this regard, the Tribunal notes that the university degrees of the resource proposed by MKTG are in Slavic Studies, Russian and German. On the Tribunal's review, MKTG's proposal does not explain or demonstrate how these branches of study included the English or French language, let alone a specialization in translation in English or French. In view of the foregoing, the Tribunal finds that DFO's conclusion that MKTG's proposal did not comply with this requirement was reasonable in the circumstances and does not warrant the Tribunal's intervention. The Tribunal therefore concludes that the complaint in this regard also fails to disclose a reasonable indication that MKTG's proposal was evaluated in a manner that violated the provisions of the *AIT* or that was inconsistent with the requirements of the solicitation documents.

20. With respect to the allegation that the educational requirement was ambiguous, in that it did not provide details surrounding what would be considered an "acceptable" specialization in translation studies, the Tribunal notes that MKTG, in this case, had an obligation to seek clarification prior to submitting its offer on June 28, 2011, rather than to rely on assumptions. Indeed, article 1.5 of Section 1 of the RFSO was clear that suppliers were to obtain clarification and to prepare their bids in accordance with the instructions in the bid solicitation. If MKTG was of the view that the solicitation documents did not clearly set out what would be considered a "... degree from a recognized university with [an] acceptable specialization in Translation (in English or French)", it could and should have sought clarification in this regard prior to submitting its proposal. Also, as the closing date of the solicitation was June 28, 2011, MKTG's allegation that the requirement in question was vague or ambiguous has not been filed in a timely matter.¹¹

11. 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." Since the Tribunal considers that the onus was on MKTG to seek clarifications of the alleged ambiguities with respect to the education requirement prior to submitting its offer on June 28, 2011, any complaint regarding the meaning of this requirement would have had to have been filed on July 13, 2011, at the latest (10 working days from June 28, 2011).

21. Finally, with respect to the allegation that, before rejecting MKTG's proposal, DFO should have sought clarifications regarding the aspects of the proposal that were deemed non-compliant, the Tribunal notes that the responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder. Accordingly, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant in all essential elements. The Tribunal is also of the view that, while a procuring entity may, in some circumstances, seek clarification of a particular aspect of a proposal, it is not under any obligation to do so.¹²

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

DECISION

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

Stephen A. Leach
Stephen A. Leach
Presiding Member

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