



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2011-027

Dymech Engineering Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, December 2, 2011*

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IN THE MATTER OF a complaint filed by Dymech Engineering Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

DYMECH ENGINEERING INC.

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Dymech Engineering Inc. Pursuant to Article 4.1 and Appendix A to the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in Article 4.2 of the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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STATEMENT OF REASONS

1. On September 7, 2011, Dymech Engineering Inc. (Dymech) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. KM044-101203/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of the Environment (Environment Canada) for the manufacture, supply and delivery of tilttable poles for the support of wind measuring equipment. A tilttable pole is comprised of an aluminum pole attached to a galvanized steel pivot base and is equipped with instrumentation that gathers data on wind conditions in a given area.
2. Dymech alleged that PWGSC incorrectly declared its bid non-compliant with a mandatory requirement of the solicitation. Dymech requested, as a remedy, that the Tribunal recommend that PWGSC declare its bid compliant and award the contract, including future optional quantities, to Dymech. In the alternative, Dymech requested its lost profits. Dymech also requested its costs in proceeding with the complaint.
3. On September 15, 2011, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.²
4. The Tribunal did not issue a postponement of award of contract order pursuant to subsection 30.13(3) of the *CITT Act*, since the evidence on the file indicated that a contract had already been issued. On September 20, 2011, PWGSC confirmed to the Tribunal that a contract had been awarded to GHM Engineering Group Inc. (GHM).
5. On October 11, 2011, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On October 21, 2011, pursuant to rule 104, Dymech filed its comments on the GIR.
6. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

7. On May 12, 2011, PWGSC issued the Request for Proposal (RFP) for the procurement process at issue.
8. Among the mandatory criteria listed in Annex C to the RFP is criterion M1, which is particularly relevant in this inquiry; it provides as follows:

Welding Certification: Bidders must submit with their bid a copy of their Welding Certificate, or their sub-contractor's Welding Certificate, which demonstrates that they meet the welding requirements specified in the [Meteorological Service of Canada's] Procurement Specification.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

9. Annex A to the RFP sets out the “Meteorological Service of Canada [MSC] Procurement Specification for Standard Wind Equipment Pole (Tilttable)”, which includes the following requirements:

PART 2 TECHNICAL REQUIREMENTS

...

2.5 Welding of Steel

Perform all welding of steel in accordance with [Canadian Standards Association (CSA)] Standard W59, by a fabricator fully approved by the Canadian Welding Bureau [CWB] to the requirements of CSA Standard W47.1. Seal weld all lapping and contact surfaces prior to galvanizing. Grind smooth all sharp or rough surfaces of welds and remove weld spatter prior to galvanizing.

2.6 Welding of Aluminum

Perform all welding of aluminum in accordance with CSA S157, by a fabricator qualified to CSA W47.2. Grind smooth all sharp or rough surfaces of welds and remove weld spatter.

10. On June 15, 2011, PWGSC issued amendment No. 001 to the RFP in order to answer questions from potential suppliers. This amendment did not pertain to criterion M1 and is therefore not relevant to this inquiry. The deadline for the receipt of proposals was June 22, 2011. According to PWGSC, seven proposals were submitted, including one from Dymech.⁴

11. Dymech’s bid contained the following statement in respect of criterion M1, “Welding Certification”:⁵
Dymech is certified in CWB – CSA W47.1 (steel), CSA W47.2 (aluminum) welding. Please see copies of the firm’s certificates on the next two pages.

12. Dymech’s bid contained two certificates from the CWB. The first acknowledged that Dymech was certified to CSA Standard W47.1 for the fusion welding of steel and had an initial certification date of May 29, 2002. The second acknowledged that Dymech was certified to CSA Standard W47.2M for the fusion welding of aluminum and had an initial certification date of December 21, 2004.⁶ Both certificates contained statements indicating that “[c]ertification is validated yearly via a ‘Letter of Validation’, a copy of which is available from the company”. No additional letters related to the yearly validation of the certification were submitted with Dymech’s proposal.

13. According to the GIR, on August 4, 2011, PWGSC completed its assessment of the bids received in response to the RFP, with PWGSC having determined that Dymech’s bid did not meet criterion M1, “Welding Certification”.

14. In a letter dated August 11, 2011, PWGSC informed Dymech that its bid had been declared non-compliant on the basis that the welding certificates had expired. PWGSC also informed Dymech that a contract had been awarded to GHM. According to the complaint, that same day, Dymech contacted PWGSC by telephone to express its concerns regarding PWGSC’s evaluation of its bid and, in response, PWGSC advised that it would be placing a stop work order on the contract while Dymech’s allegations were investigated.

15. On August 12, 2011, Dymech also sent an e-mail to PWGSC, reiterating its position that the certificates that it had provided with its proposal met the mandatory requirements of the RFP.

4. GIR at para. 10.

5. Public complaint.

6. *Ibid.*

16. In an e-mail dated August 24, 2011, PWGSC informed Dymech that its decision with respect to the evaluation of Dymech's proposal remained unchanged. PWGSC indicated that the mandatory criterion was that bidders submit certificates demonstrating that they currently meet the specified welding requirements and that the certificates provided by Dymech did not establish current compliance with those requirements, since they merely indicated an initial certification date and did not, on their face, specify that the certification was still valid. In the same e-mail, PWGSC also stated that it could not have sought additional documents from Dymech (i.e. the letter of validation confirming that the initial certification was still valid) after bid closing, as the production of the letter of validation at that point in time would have constituted bid repair.

17. In a letter dated August 26, 2011, Dymech requested that PWGSC reconsider its decision that Dymech's proposal was non-compliant. By letter dated August 31, 2011, PWGSC informed Dymech that its decision declaring Dymech's bid non-compliant would stand.

18. On September 7, 2011, Dymech filed its complaint with the Tribunal.

POSITIONS OF PARTIES

Dymech

19. Dymech claimed that the RFP contained no requirement that welding certificates be accompanied by a letter of validation and that PWGSC mistakenly determined that the welding certificates were expired. Dymech submitted that it included its welding certificates in its bid, as required by the RFP. Dymech further submitted that the welding certificates do not contain an expiry date. It contended that letters of validation are typically sent after the award of the contract, before the welding operations for the project are performed. Dymech also submitted that it expected PWGSC to verify that its certificates were valid, either by contacting the CWB or by requesting the letter of validation during the period when the welding operations would be performed.

20. Dymech claimed that there was nothing on the face of the welding certificates submitted with its bid that indicated that the certificates were not valid at the time of bid submission. Dymech further submitted that the note on the certificate with respect to certification being validated yearly by way of a letter of validation was not synonymous with saying that a welding certificate issued by the CWB was no longer valid unless accompanied by a letter. In this regard, it claimed that the welding certificates that it provided were sufficient to demonstrate that Dymech was certified by the CWB, as required by the RFP.

21. With regard to its expectation that PWGSC would verify the validity of the welding certificates that it provided, Dymech referred to article 16 of PWGSC's "2003 Standard Instructions – Goods or Services – Competitive Requirements (2010-10-07)",⁷ which was incorporated by reference in Part 2, "Bidder Instructions", of the RFP. This article 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;
 - ...
 - (f) verify any information provided by bidders through independent research, use of any government resources or by contacting third parties;
 - ...

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

22. Dymech submitted that, in accordance with this article, it would have been appropriate in the circumstances for PWGSC to have sought clarification on the validity of the welding certificates.

23. In particular, Dymech argued that PWGSC had an obligation to seek clarification on the validity of the welding certificates, as the RFP did not clearly set out a requirement to demonstrate their validity by the end of the bidding period. Dymech submitted that, in this instance, a clarification would not have led to a substantial change in its bid and would have been acceptable as an explanation of an aspect of the bid.

24. Dymech also submitted that PWGSC could have verified the validity of the certificates submitted with its bid with the CWB directly, which would not have involved receiving any additional information from Dymech.

PWGSC

25. PWGSC submitted that the allegations that it incorrectly declared Dymech's proposal non-compliant with a mandatory requirement of the RFP and that it had an obligation to verify or clarify whether Dymech's welding certificates were valid were devoid of merit.

26. PWGSC argued that the only reasonable interpretation of the plain language of criterion M1, when read in the context of the RFP as a whole, and in particular, articles 2.5 and 2.6 of Annex A thereto, is that the required welding certificates must be currently valid and submitted with the bid. PWGSC submitted that, in order to meet the terms of criterion M1, a bidder had to clearly demonstrate in its bid that it held currently valid welding certificates for the appropriate CSA standard. It further submitted that a bidder could not meet this standard by only submitting welding certificates that indicated an initial certification date without evidence that the certificates were still valid.

27. PWGSC claimed that the welding certificates submitted by Dymech did not, on their face, indicate that they were currently valid. Specifically, PWGSC argued that there was no indication on the certificates that attested that they were currently valid. Rather, they merely indicated that the initial certification is validated yearly by the CWB via a letter of validation. In PWGSC's view, this meant that, in order to comply with the mandatory requirement at issue, Dymech was required to submit, with its proposal, letters of validation to confirm that its welding certificates were currently valid, which it failed to do. Given that the documents provided by Dymech themselves signaled that additional documentation was necessary to demonstrate current welding certification, PWGSC submitted that the only determination that it could have made in these circumstances was that Dymech's proposal did not meet criterion M1 of the RFP.

28. With respect to Dymech's assertion that PWGSC ought to have sought clarification, PWGSC submitted that Dymech was attempting to reverse the well-established onus on a bidder to respond to the requirements of a solicitation.⁸ PWGSC also submitted that it was well established by the Tribunal that, while PWGSC may seek clarification from bidders in appropriate circumstances in which an aspect of a bid is unclear, it is under no obligation to do so.⁹

29. In this regard, PWGSC submitted that the error in Dymech's proposal did not present an appropriate circumstance to seek clarification and that to have done so would have amounted to a substantive revision or modification of Dymech's proposal, which would have constituted impermissible bid repair. According to PWGSC, the right to seek clarification is not a mechanism through which PWGSC can seek additional documentation that would render compliant certification documents that would otherwise be non-compliant.

8. See *Re Complaint Filed by Info-Electronics H P Systems Inc.* (2 August 2006), PR-2006-012 (CITT) [*Info-Electronics*] at para. 23.

9. *Info-Electronics* at para. 34.

TRIBUNAL'S ANALYSIS

30. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *North American Free Trade Agreement*,¹⁰ the *Agreement on Internal Trade*,¹¹ the *Canada-Chile Free Trade Agreement*¹² and the *Canada-Peru Free Trade Agreement*.¹³

31. 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.”

32. Article 1013 of *NAFTA* provides that the tender documents “. . . shall contain all information necessary to permit suppliers to submit responsive tenders . . . [and] shall also include . . . the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders”

33. Similarly, Article 1015(4) of *NAFTA* provides as follows:

An entity shall award contracts in accordance with the following:

- a. to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;
- . . .
- d. awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; and
- . . .

34. The *CCFTA* and the *CPFTA* contain provisions similar to those found in *NAFTA*.

10. *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*].

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

12. *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.

13. *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*]. The value of the procurement appears to fall below the monetary threshold for the *Agreement on Government Procurement* (15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>). Additionally, the Tribunal notes that the *Canada-Colombia Free Trade Agreement (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*] had not yet entered into force when the solicitation in question was issued. As such, the *CCOFTA* does not apply.

35. The requirement is for the manufacture, supply and delivery of 40 tiltable poles for the support of wind measuring equipment, with an option to purchase up to 40 more during the 24-month period following contract award. These poles are intended for installation at various meteorological sites.

36. Part 4, “Evaluation Procedures and Basis of Selection”, of the RFP provides that “[b]ids will be assessed in accordance with the entire requirement of the bid solicitation including the technical and financial evaluation criteria.” With regard to the technical evaluation of proposals, it provides that “[b]ids will be evaluated in accordance with the mandatory technical criteria as detailed herein on Annex C.” In this regard, it further provides that “[a] bid must comply with the requirements of the bid solicitation and *meet all mandatory technical evaluation criteria* to be declared responsive” [emphasis added].

37. The requirement that a bid meet all the mandatory technical criteria in order to be considered responsive is reiterated and expounded upon in Annex C, “Mandatory Technical Criteria”, to the RFP, which provides as follows:

Bidders must comply with all the mandatory technical criteria, and must provide supporting documentation with their bid, where indicated. Bidders not meeting all of the mandatory technical criteria will be considered non-responsive and will not be given further consideration.

[Emphasis added]

38. Among the mandatory technical criteria enumerated in Annex C is the following:

M1 Welding Certification: Bidders must submit with their bid a copy of their *Welding Certificate*, or their sub-contractor’s *Welding Certificate*, *which demonstrates that they meet the welding requirements specified in the MSC’s Procurement Specification.*

[Emphasis added]

39. As noted by the Tribunal in File No. PR-2010-078,¹⁴ “[e]valuators are not allowed to apply requirements that are not explicit in, or do not arise by necessary implication from, a proper contextual reading of the solicitation documentation.”¹⁵

40. The Tribunal is of the view that compliance with criterion M1, on a plain reading of that criterion in its entirety, requires that a bidder submit not simply a welding certificate but rather a welding certificate that demonstrates that it “meet[s]” the specified welding requirements. In other words, the welding certificate must demonstrate that the bidder is in a state of current compliance with these requirements.

41. That the welding certification must be current is also evident from a contextual reading of criterion M1 in the light of Annex A to the RFP, which contains the MSC’s procurement specification referred to in the criterion. Of particular relevance in this regard are the following paragraphs, which clearly require that CWB recognition of qualification to the requisite welding standard be contemporaneous with the performance of the welding work:

2.5 Welding of Steel

Perform all welding in accordance with CSA Standard W59, by a fabricator fully approved by the Canadian Welding Bureau to the requirements of CSA Standard W47.1. . . .

2.6 Welding of Aluminum

Perform all welding of aluminum in accordance with CSA S157, by a fabricator qualified to CSA W47.2. . . .

14. *Re Complaint Filed by Accipiter Radar Technologies Inc.* (17 February 2011) (CITT).

15. *Ibid.* at para. 50.

42. The Tribunal notes that welding certificates are issued by the CWB, which is accredited by the Standards Council of Canada. The Tribunal also notes that the welding certificates that establish that Dymech was certified for the fusion welding of steel and aluminum, which formed part of its bid, indicate an initial certification date but do not specify an expiry date.

43. However, the very fact that the certification date is qualified by the word “initial” is indicative of a periodic revalidation of qualifications. Indeed, each welding certificate indicates that “[c]ertification is validated yearly via a ‘Letter of Validation’, a copy of which is available from the company”.

44. The term “validation” is defined as “. . . [t]he action of . . . making valid. . . .”¹⁶ The term “valid” is in turn defined to mean “Founded on truth of fact; capable of being justified”¹⁷ That a welding certificate would be subject to regular validation by the CWB is not unusual and, indeed, is to be expected, since it cannot be assumed that the facts that justified the initial certification would continue to adhere from one year to the next. In this regard, the evidence indicates that, “. . . according to the Canada Welding Bureau (CWB), the certification with the initial issuance date is not good indefinitely”,¹⁸ with Dymech not contesting PWGSC’s claim that the CWB has to “. . . perform 2 audits in a year to issue a Letter of Validation to the company.”¹⁹

45. On the basis of these considerations, the Tribunal does not find persuasive Dymech’s assertion that the statement included on the welding certificates advising of the annual validation of certifications via letters of validation “. . . [was] not synonymous with saying the copy of the certificate [was] invalid unless accompanied by a ‘Letter of Validation.’”²⁰

46. As the relevant document for establishing compliance with criterion M1, a welding certificate with an initial certification date falling within one year of the bid closing date would be, in and of itself, sufficient, as the continuing validity of the initial certification would be evident on the face of the document itself. However, where, as in the present case, the current validity of the welding certificate is not evident on the face of the document itself by virtue of the fact that the initial certification date has been rendered stale by the passage of time, it is the Tribunal’s view that compliance with criterion M1 would, by necessary implication, require that the welding certificate be accompanied by a CWB letter of validation that establishes the continuing validity of the initial certification.

47. While, as noted by Dymech, no explicit request was made in the RFP for a letter of validation,²¹ because this requirement arose by necessary implication from both a plain and contextual reading of criterion M1, the Tribunal does not consider the *contra proferentem* principle²² to be applicable or even relevant in the circumstances, as there was no ambiguity as to the scope of the requirement in criterion M1, properly read.

48. The Tribunal stated in File No. PR-99-020²³ that procuring entities must evaluate bidders’ conformance with the mandatory requirements of a solicitation thoroughly and strictly, indicating, however, that there could be exceptions for matters of form over substance. In the same vein, Charron J., in *Double N Earthmovers Ltd. v. Edmonton (City)*,²⁴ stated that “[t]he test for compliance in the tendering process is

16. *The Oxford English Dictionary*, 2nd ed., s.v. “validation”.

17. *Black’s Law Dictionary*, Sixth Edition, s.v. “valid”.

18. GIR, exhibit 6.

19. *Ibid.*

20. Comments on the GIR at para. 4b).

21. Complaint at 6; comments on the GIR at para. 3b).

22. Principle of interpretation which is defined in *Black’s Law Dictionary*, 9th ed., s.v. “*contra proferentem*” as follows: “The doctrine that, in interpreting documents, ambiguities are to be construed unfavourably to the drafter.”

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

24. [2007] 1 S.C.R. 116 (S.C.C.) [*Double N Earthmovers*].

'substantial' rather than strict'²⁵ [emphasis added] and that "[s]ubstantial compliance requires that *all material conditions* of a tender, *determined on an objective standard, be complied with . . .*"²⁶ [emphasis added]. In this regard, the requirement in criterion M1 that a bidder demonstrate that it currently meets the welding requirements specified in the MSC's procurement specification is clearly one of substance and a material condition of the solicitation. Thus, it was incumbent upon the bidder to exercise due diligence in the preparation of its proposal to make sure that it was compliant with all essential elements of the solicitation.²⁷ In the context of the procurement process at issue, Dymech therefore had to demonstrate, in its bid, full compliance with criterion M1.

49. As already noted, compliance with criterion M1 required Dymech to submit, as part of its technical bid, either welding certificates whose continued validity was evident on their faces or where a welding certificate could not speak to its own continuing validity by virtue of the fact that the initial certification was stale-dated, the welding certificate accompanied by a letter of validation, which, in such instances, is indispensable to establishing that the bidder continues to meet the substantive welding requirements specified in the MSC's procurement specification, as explicitly required by criterion M1.²⁸ Given Dymech's failure to provide a current letter of validation, it cannot be said that PWGSC's conclusion that Dymech's proposal was non-compliant concerned a matter of form over substance. Nor can it be said that the evaluators ignored information that was provided with the bid or misinterpreted the scope of criterion M1 in reaching this conclusion.

50. The Tribunal notes that, in its comments on the GIR, Dymech stated as follows: "In fact, Dymech *claims* to be certified with the Canadian Welding Bureau (CWB) three times in the proposal dated June 21, 2011"²⁹ [emphasis added]. However, it is the Tribunal's view that the simple assertion of something as a fact does not constitute the "demonstration" of same, as specifically required by criterion M1.

51. It is well established in Tribunal jurisprudence that responsibility for ensuring that a proposal is compliant with all essential elements of a solicitation ultimately resides with the bidder.³⁰ That it was open to the procurement authority to seek clarifications prior to bid closing does not save Dymech's bid, it being well established in Tribunal jurisprudence that, while a procuring entity may in certain circumstances seek clarification of a particular aspect of a proposal, it is not under any duty to do so.³¹

52. In light of the foregoing and, in particular, Dymech's failure to fully respond to criterion M1, the Tribunal finds that there is no basis to interfere with PWGSC's evaluation of Dymech's proposal, since it was reasonable and consistent with the clear requirements of the RFP and the relevant provisions of the applicable trade agreements. Therefore, the Tribunal concludes that the complaint is not valid.

25. *Double N Earthmovers* at para. 109.

26. *Ibid.* at para. 110.

27. *Re Complaint Filed by The Masha Krupp Translation Group Limited* (25 August 2011), PR-2011-024 [*Masha Krupp*] at para. 21.

28. As noted above, Annex C to the RFP states as follows: "*Bidders . . . must provide supporting documentation with their bid, where indicated.*" The supporting documentation indicated in criterion M1 is not simply for welding certificates but also for welding certificates that demonstrate that bidders meet the welding requirements specified in the MSC's procurement specification. It follows that, where a welding certificate cannot speak to its own continuing validity by reason of being stale-dated, the supporting documentation that would be required for compliance with criterion M1 would include not only the original welding certificate but also the CWB's letter of validation establishing its continuing validity.

29. Comments on the GIR at para. 1.

30. *Info-Electronics* at paras. 23, 34; *Re Complaint Filed by Mircom Technologies Ltd.* (11 July 2006), PR-2006-004 (CITT) at para. 32.

31. *Re Complaint Filed by IBM Canada Limited, PricewaterhouseCoopers LLP and the Centre for Trade Policy and Law at Carleton University* (10 April 2003), PR-2002-040 (CITT) at 15-16; *Re Complaint Filed by Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13. This principle was recently reaffirmed in *Masha Krupp* at para. 21.

Costs

53. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

54. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

55. The Tribunal's preliminary indication is that this complaint case has a complexity level corresponding to the lowest level (Level 1) referred to in Annex A of the *Guideline*. The complexity of the procurement was moderate, as it involved the provision of goods manufactured according to a specification. The Tribunal finds that the complexity of the complaint was low, as it dealt with a single ground of complaint regarding whether or not PWGSC properly evaluated Dymech's technical bid. Finally, the complexity of the proceedings was low, as there were no motions, no intervener and no additional submissions by parties.

56. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

DETERMINATION OF THE TRIBUNAL

57. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

58. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Dymech. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli
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