



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-054

Kanter Marine Inc.

*Decision made
Tuesday, February 21, 2012*

*Decision issued
Wednesday, February 22, 2012*

*Reasons issued
Wednesday, March 7, 2012*

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

KANTER MARINE 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

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. M7594-121988/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for four 8.5- to 9.5-metre aluminum rigid hull inflatable boats with cabins and trailers.

3. Kanter Marine Inc. (Kanter) alleged that its proposal was improperly evaluated and declared non-compliant. Specifically, Kanter submitted that PWGSC either accidentally or intentionally misinterpreted the information included in its proposal. It also submitted that certain requirements of the solicitation were not clearly defined.

4. By way of remedy, Kanter requested that its proposal be re-evaluated and, if found compliant with the requirements of the solicitation, that it be awarded the contract. Alternatively, Kanter requested that the solicitation be reissued with a revised statement of requirements.

5. The Request for Proposal (RFP) for the provision of inflatable boats was issued, by PWGSC, on November 30, 2011. The deadline for the receipt of bids was originally December 20, 2011, but this bid closing date was changed to January 5, 2012, through amendments to the solicitation.

6. Parts 3 and 4 of the RFP advised bidders of the criteria that they were required to meet in their proposals. Among the criteria of particular relevance to the present complaint are the following:

PART 3 – BID PREPARATION INSTRUCTIONS

...

Section I – Technical Bid

In their technical bid, bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements. Bidders should demonstrate their capability in a thorough, concise and clear manner for carrying out the work.

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. Simply repeating the statement contained in the bid solicitation is not sufficient. . . .

...

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION

...

1.1.1. Mandatory Technical Criteria

In order to be compliant, Bidder's proposal must, to the satisfaction of Canada, meet all requirements of the TSOR [Technical Statement of Requirement] and provide all information as requested below.

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

7. The TSOR, which is Annex “A” to the RFP, in turn, includes the following requirements:

4.0 OPERATIONAL PERFORMANCE

...

4.3 Maximum Speed: at least 48+ knots

...

7.0 HULL

...

7.6 Hull design shall be such that a sufficient number of watertight compartments, including hull compartments, and low smoke and flame spread flotation foam, or fire retardant flotation, or flotation devices, will allow for adequate stability and positive buoyancy in a flooded condition.

...

8.0 DECK

...

8.12 A cruciform tow post used for EMERGENCY towing, rated for 3000 lbs. (1360 kg.) shall be supplied and permanently attached to aft deck ahead of the thrust point of the vessel. Hand cranked tow reel shall be fitted to post with 100 meters of buoyant 3/4 inch towline. A removable cover shall be supplied for tow reel with a fastening system to allow quick removal. A sufficient screen protection barrier shall be installed to prevent aft egress and recoil of towing line. Color shall be flat black.

8. Kanter submitted a proposal in response to the solicitation. On January 19, 2012, further to a request from PWGSC, Kanter provided clarifications and additional documentation in support of the response to the TSOR included in its proposal.

9. On January 31, 2012, PWGSC informed Kanter that its proposal had been deemed non-compliant because it did not meet the aforementioned requirements. PWGSC also informed Kanter that a contract had been awarded to another bidder, i.e. Titan Inflatables Ltd. On February 1, 2012, Kanter objected to its disqualification.

10. According to the complaint, PWGSC responded to Kanter’s objection on February 3, 2012, by confirming the results of its evaluation. On February 8, 2012, Kanter sent a second objection to PWGSC, reiterating its concerns regarding the evaluation of its proposal.³

11. In essence, Kanter’s complaint to the Tribunal is that, in view of the information and documentation included in its proposal and the clarifications that it provided to PWGSC during the procurement process, the disqualification of its proposal for non-compliance with certain requirements of the TSOR was improper.

3. The Tribunal notes that Kanter’s objections and PWGSC’s response were not filed with the Tribunal as attachments to the complaint. Nevertheless, the complaint included sufficient information for the Tribunal to assess the nature of Kanter’s concerns and the reasons of the disqualification of its proposal by PWGSC.

12. 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 the *North American Free Trade Agreement*,⁴ the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ the *Canada-Chile Free Trade Agreement*,⁷ the *Canada-Peru Free Trade Agreement*⁸ or the *Canada-Colombia Free Trade Agreement*⁹ applies. In this case, only the *AIT* applies.

13. Article 506(6) of the *AIT* provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. 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. PWGSC identified three separate reasons for declaring Kanter’s technical bid non-compliant:

- the proposal did not include hull compartments having low smoke and flame spread flotation foam, or fire retardant flotation, or flotation devices as required by item 7.6 of the TSOR;
- the supporting documentation provided with the proposal, from the Lloyd’s Register of Shipping, indicated that the design offered would not meet the speed requirement of at least 48 knots; and
- the proposal did not include the 100 metres of buoyant 3/4-inch towline as required by item 8.12 of the TSOR.

15. The Tribunal will first examine the issue of whether there is a reasonable indication that PWGSC breached the provisions of the *AIT* in finding that Kanter’s proposal failed to comply with item 7.6 of the TSOR.

16. As noted above, item 7.6 of the TSOR provides as follows:

7.6 *Hull design shall be such that a sufficient number of watertight compartments, including hull compartments, and low smoke and flame spread flotation foam, or fire retardant flotation, or flotation devices, will allow for adequate stability and positive buoyancy in a flooded condition.*

[Emphasis added]

4. *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).

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

7. *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). Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.

8. *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).

9. *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).

17. In its response to this requirement, Kanter's technical bid indicated the following: "The vessel's watertight below decks buoyancy compartments will allow for adequate stability and buoyancy in a flooded condition." The Tribunal notes that there is no evidence before it that would indicate that Kanter provided additional explanations as to how it would meet this requirement.

18. By way of objection to PWGSC's finding of non-compliance in respect of this requirement, Kanter stated that, in its view, "... this section of the TSOR [was] very poorly written."¹⁰ In support of its claim, Kanter stated the following: "There was apparently confusion regarding this section in a similar TSOR which necessitated the cancelling and reissuing of the solicitation with revised wording . . ."¹¹ Insofar as the revision of similar wording in a previous TSOR suggested ambiguity in the wording of item 7.6 of the current TSOR, it was incumbent upon Kanter to seek timely clarification.

19. Indeed, if Kanter had any concerns about that particular mandatory criterion, or was unsure of its meaning in view of the revision of the wording of similar requirements in previous solicitations, it should have questioned PWGSC in this regard or objected to the inclusion of this mandatory criterion when it first became aware of it, that is, prior to submitting its bid. In this regard, the Tribunal stated the following in a previous case:

The Federal Court of Appeal also recently made a decision with respect to the issue of ambiguity in RFPs in *IBM Canada v. Hewlett-Packard (Canada) and the Minister of Public Works and Government Services*. In that decision, in the context of discussing time limits for filing complaints with the Tribunal, the Federal Court of Appeal made clear the importance of potential suppliers complaining as soon as they are aware of a flaw in the process, including problems with the interpretation of solicitation requirements:

They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. The whole procurement process . . . is meant to be as open as it is meant to be expeditious.

The Federal Court of Appeal went on to say that to adopt a "wait-and-see attitude" is precisely what the procurement process and Regulations seek to discourage.¹²

[Footnotes omitted]

20. However, the complaint did not provide any evidence that any bidder asked any questions on this issue during the solicitation period.

21. In any event, such revised wording in another solicitation, being extraneous to the TSOR in issue, is irrelevant to the Tribunal's consideration of same. The Tribunal notes that, in a previous case, it stated that the particular requirements of previous solicitations, or any other past practice between parties for that matter, are not relevant to its assessment of a complaint concerning aspects of the solicitation at issue in the complaint.¹³

10. See Kanter's document titled "Procurement Complaint Form".

11. *Ibid.*

12. *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT) at 10.

13. *Re Complaint Filed by Teledyne Webb Research, a business unit of Teledyne Benthos, Inc.* (20 October 2011), PR-2011-038 (CITT) at 4.

22. Turning to the merit of Kanter's allegation concerning item 7.6 of the TSOR, Kanter claimed to have interpreted the wording as allowing the bidder to propose "... *either* an airtight below deck buoyancy compartment *or* foam or other type of buoyancy materials to provide the specified 'floatation in the flooded condition.'" [Emphasis added]

23. In so stating, Kanter effectively concedes that it did not meet the technical requirement of item 7.6 of the TSOR, as interpreted by PWGSC in the evaluation of Kanter's technical bid.

24. Therefore, the issue before the Tribunal is whether item 7.6 of the TSOR was ambiguous in its requirement.

25. In the Tribunal's view, item 7.6 of the TSOR, which relates specifically to hull design,¹⁴ is clear and unambiguous. First, the phrase "*shall be such that*" [emphasis added] makes it clear that the ensuing hull design specifications are mandatory in nature. Second, the use of the conjunctive "*and*" [emphasis added] (instead of the disjunctive "or") after the words "*including hull compartments*" [emphasis added] clearly indicates that, in order to be considered compliant, the technical bid had to *include* both watertight compartments *and* low smoke and flame spread flotation foam, or fire retardant flotation, or flotation devices.

26. As previously stated, Article 1.1.1 of Part 4 of the RFP states the following: "In order to be compliant, Bidder's proposal must, to the satisfaction of Canada, meet *all* requirements of the TSOR . . ." [Emphasis added]

27. In the Tribunal's view, the failure of Kanter's proposal to fully respond to the technical requirements of item 7.6 of the TSOR was itself a sufficient basis for PWGSC to declare Kanter's bid non-compliant.

28. It is well established that there is an onus on bidders to demonstrate full compliance with mandatory criteria.¹⁵ The Tribunal has also stated 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 respects.¹⁶

29. That being the case, the Tribunal does not consider it necessary to examine the other grounds cited by PWGSC for declaring the proposal non-compliant to the RFP in order to dispose of the complaint.

30. As such, the Tribunal finds that PWGSC acted properly and reasonably in disqualifying Kanter's proposal and sees no reason to interfere with the judgment of the evaluators and, in particular, with their conclusion that Kanter's proposal was non-compliant with a mandatory requirement of the RFP.¹⁷

14. The word "hull" is defined as follows: "The main structural body of the ship, not including the deck, keel or mast. The part that keeps the water out of the boat." Online: *Marine Dictionary 2009*, <<http://maritimediictionary.org/ASP/MarineDictionary.asp?WORD=hull>> s.v. "hull".

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

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

17. In *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005) PR-2005-004 (CITT) at para. 51, the Tribunal indicated that it "... will interfere only with an evaluation that is *unreasonable*."

31. Consequently, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the *AIT*. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

32. 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