



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-038

Teledyne Webb Research, a
business unit of Teledyne Benthos,
Inc.

*Decision made
Thursday, October 20, 2011*

*Decision issued
Thursday, October 20, 2011*

*Reasons issued
Thursday, October 27, 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

TELEDYNE WEBB RESEARCH, A BUSINESS UNIT OF TELEDYNE BENTHOS, 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.

Jason W. Downey
Jason W. Downey
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. F1625-100301/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Fisheries and Oceans (DFO) for profiling floats.

3. Teledyne Webb Research, a business unit of Teledyne Benthos, Inc. (TWR) alleged that its proposal was improperly declared non-compliant. Specifically, TWR alleged that PWGSC misunderstood the requirement of the solicitation that certain user manuals and technical details about the sensor manufacturer, model number and serial numbers be provided with its bid. According to TWR, manuals and accompanying information are unique to each float and are based on customer specifications at the time of order and final build. TWR submitted that, therefore, the manuals and information are created within the float build cycle and would not be available until the floats are delivered.

4. As a remedy, TWR requested that the bids be re-evaluated and that PWGSC ask the DFO whether it complied with the requirement on the basis of the DFO's knowledge of TWR's product and build cycle. TWR claimed that it has been providing such floats and manuals for approximately 15 years.

5. On May 26, 2011, PWGSC issued the Request for a Standing Offer (RFSO) for the provision of profiling floats. The deadline for the receipt of bids was July 7, 2011.

6. Parts 3 and 4 and Annex "A" of the RFSO advised bidders of the criteria that they were required to meet in the preparation of their offers. Among these criteria were the following, which are relevant for the purposes of this complaint:

PART 3 – OFFER PREPARATION INSTRUCTIONS

...

Section I: Technical Offer

In their technical offer, offerors should explain and demonstrate how they propose to meet the requirements and how they will carry out the Work.

...

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

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

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION

...

1.1.1. Mandatory Technical Criteria Please see Annex A

...

2.1 Basis of Selection - Mandatory Technical Criteria Only: An offer must comply with the requirements of the Request for Standing Offers and meet all mandatory technical evaluation criteria to be declared responsive.

7. Annex "A" of the RFSO contains a table with four columns, three of which are titled. The following excerpt of Annex "A" shows the relevant elements:

ANNEX "A" – REQUIREMENT			
...			
	Float capabilities / requirements	Meeting mandatory requirement	Supporting Documentation / info provided**
	
Documentation	Provide float user manuals and technical details about sensor manufacturer, model number and serial numbers	As stated	

*****Unless specified otherwise in the bid solicitation, Canada will evaluate only the documentation provided with a bidder's bid. Canada will not evaluate information such as references to Web site addresses where additional information can be found, or technical manuals or brochures not submitted with the bid.***

8. TWR submitted a bid in response to the solicitation.

9. On October 3, 2011, PWGSC advised TWR that its proposal had been deemed non-compliant because it had not provided the necessary manuals with its bid.³ TWR objected to its disqualification on October 4, 2011. In its objection, TWR stated that the solicitation had not requested that the manuals be provided with the bid, but that suppliers were required to provide "floats with manuals". It submitted that it could not know what manual to provide without knowing the specifications for a particular float. It further submitted that, if it had known that PWGSC had wanted to actually see a manual, it could have provided an old manual that had been previously provided to the DFO. TWR also invoked, as part of its objection, past practices where such documents were delivered with the floats themselves.

3. The complaint did not include a copy of this letter. However, subsequent correspondence from PWGSC filed with the complaint indicated that this information had been included in that letter and that the failure to comply with the mandatory requirement of providing the manuals and technical details of the float models proposed was the basis for the disqualification of TWR's proposal. An e-mail dated October 4, 2011, from PWGSC reads as follows: "PWGSC's final decision was expressed in its regret letter email sent to Teledyne Webb Research on 03 OCT 2011 12:28. As indicated therein, *one of the mandatory requirements listed in Annex A was the provision of user manuals, which was not met by your company.*" [Emphasis added]

10. On October 4, 2011, PWGSC responded to TWR by advising it that, as had been expressed in the correspondence of October 3, 2011, TWR had not met the mandatory requirement of providing user manuals. PWGSC further advised TWR that, as a potential supplier, it had the responsibility to clarify any uncertainties regarding the requirement at issue.

11. On October 13, 2011, TWR filed submissions with the Tribunal. TWR's submissions did not comply with subsection 30.11(2) of the *CITT Act* and, thus, constituted a deficient complaint.

12. On October 17, 2011, the Tribunal advised TWR that additional information was required before the complaint could be considered properly filed.⁴

13. On October 17, 2011, TWR provided additional information, and the Tribunal considered the complaint properly filed.

14. In essence, TWR's complaint to the Tribunal echoes its objection to PWGSC, i.e. that PWGSC improperly disqualified its bid for failing to provide the above-noted documentation because the RFSO did not clearly require that the documentation be provided at the time of the bid. The complaint is therefore based on an alleged lack of clarity of the bid documents.

15. 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*,⁵ Chapter Five of the *Agreement on Internal Trade*,⁶ the *Agreement on Government Procurement*,⁷ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁸ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*⁹ or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*¹⁰ applies. Given that TWR appears to be a company based in the United States, it can only apply for review by the Tribunal if *NAFTA* or the *AGP* apply. In this case, both are applicable.

16. The Tribunal does not consider the RFSO to be ambiguous and finds that its terms clearly required bidders to provide the requested documentation at the time of bid submission.

4. Subrule 96 (1) of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, reads as follows:

“96. (1) A complaint shall be considered to have been filed

(a) on the day it was received by the Tribunal; or

(b) in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.” [Emphasis added]

5. *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*].

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

7. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

8. *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.

9. *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).

10. *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. The Tribunal considers that, if TWR had any concerns about that particular mandatory criterion, or was unsure of its meaning, it should have questioned PWGSC in this regard or objected to the inclusion of this mandatory requirement when it first became aware of the requirement, that is, prior to submitting its bid. In this regard, the Tribunal notes that it 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.¹¹

[Footnotes omitted]

18. The Tribunal is of the view that the bidder is ultimately responsible for ensuring that its proposal is compliant with all essential elements of a solicitation and notes that, in the present case, bidders were informed that their bids were required to meet all mandatory evaluation criteria, including the provision of the specified documentation.

19. Since this requirement was apparent on the face of the solicitation documents, TWR could and should have sought clarification or otherwise filed an objection or a complaint with the Tribunal before learning the results of the evaluation, if it was of the view that the requested documentation could not be provided at the time of bid. In other words, the present situation could have been avoided if TWR had clarified the requirement for documentation found in Annex “A” of the RFSO with PWGSC during the solicitation period. The complaint did not provide any evidence that any bidder asked any questions on this issue during the solicitation period.

20. The Tribunal also notes that TWR’s proposal included with the complaint did not address or contain any reference to the documentation element found in the table of requirements of Annex “A” of the RFSO. TWR’s proposal addressed all the other elements found in the table but was completely silent with respect to the documentation element mentioned above.

21. TWR’s bid did not acknowledge the requirement, let alone indicate when, or if at all, the required documentation would be provided. As such, the Tribunal finds that PWGSC acted properly and reasonably in disqualifying TWR’s proposal.

22. The Tribunal could not take into consideration the claims made by TWR that it had provided the documentation with the floats, not with its bids, in the past, as the particular requirements of previous solicitations, or any other past practice between parties for that matter, are not relevant to its assessment of the current complaint. Moreover, the terms of the RFSO clearly stated that only the documentation provided with the bids would be evaluated.

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

23. 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 either *NAFTA* or the *AGP*. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Jason W. Downey

Jason W. Downey
Presiding Member