



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-011

9198-6919 Québec Inc. o/a
Verreault Inc.

Decision made
Wednesday, August 1, 2012

Decision issued
Thursday, August 2, 2012

Reasons issued
Tuesday, August 14, 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

9198-6919 QUÉBEC INC. O/A VERREAULT INC.

AGAINST

DEFENCE CONSTRUCTION CANADA

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

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. HQ2637C1) by Defence Construction Canada (DCC) for the construction of a facility for light armoured vehicles at Valcartier, Quebec. The work and services required include the supply of labour, material, supervision and equipment necessary for the construction of a storage facility for light armoured vehicles. According to the Notice of Proposed Procurement, the estimated cost for this procurement is \$21,275,000.

3. The company 9198-6919 Québec Inc. o/a Verreault Inc. (Verreault) alleged that DCC erroneously declared that the bid that it submitted in response to the solicitation was non-responsive, on the following two grounds:

- the absence of the signature of an authorized representative of Verreault on the bid bond that accompanied its bid;
- a potential conflict of interest due to an alleged relationship between Verreault and LVM-Technisol Inc. (LVM), a company whose services had been retained previously by DCC to perform a geotechnical analysis of the land on which the facility subject to the procurement is to be erected.

4. Verreault maintained that the omission to sign the bid bond that accompanied its bid is not a ground of non-compliance but is, at most, a mere minor or incidental irregularity. According to Verreault, in such a case, DCC is bound to allow it to resubmit the bid bond in the proper form. Moreover, Verreault maintained that allowing it to correct this unintentional error of form in its bid would not be prejudicial to the other bidders under the circumstances.

5. Concerning the question of conflict of interest, Verreault maintained that, contrary to DCC's evaluation and conclusion, it is not in any potential or actual conflict of interest situation and that, therefore, its bid could not, under any circumstances, be declared non-responsive on this ground. According to the documents submitted with the complaint, Verreault and LVM are companies with separate legal personalities, but which are beneficially owned by the same company.

6. Verreault maintained that, in this instance, LVM's analysis was made available to all bidders and that it could not possibly have obtained information that would have provided an advantage over the other bidders. Moreover, it maintained that no LVM employee who participated in the preparation of the geotechnical analysis had played a role in the preparation of Verreault's bid. According to Verreault, its employees and representatives and those of LVM had no discussion regarding this analysis, its update, the solicitation or the preparation of its bid. Verreault therefore submitted that its team, which was responsible for the bid, did not benefit, in any case, from any undue advantage.

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

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

LEGAL FRAMEWORK

7. In order to conduct an inquiry into the complaint, 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*,³ the *Agreement on Internal Trade*,⁴ the *Agreement on Government Procurement*,⁵ the *Canada-Chile Free Trade Agreement*,⁶ the *Canada-Peru Free Trade Agreement*⁷ or the *Canada-Colombia Free Trade Agreement*⁸ applies. In this case, the complaint was made under *NAFTA*, which applies to the procurement in issue.⁹

8. Article 1015(4)(a) of *NAFTA* provides as follows: “to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation” In turn, Article 1015(4)(d) provides as follows: “awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

TRIBUNAL’S ANALYSIS

9. Therefore, the issue is whether the information contained in the complaint discloses a reasonable indication that DCC did not evaluate Verreault’s bid in accordance with the essential requirements specified in the tender documentation. In other words, the Tribunal must determine whether the information provided by Verreault discloses a reasonable indication that DCC erred in declaring its bid non-responsive in view of the requirements set out in the tender documentation.

10. The Tribunal will begin by addressing the issue of the bid bond, which was raised by DCC as a first ground in declaring Verreault’s bid non-responsive. If necessary, the Tribunal will then examine Verreault’s allegations concerning the conflict of interest issue.¹⁰

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>.

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

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). 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).

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).

9. The Tribunal thus considered the relevant provisions of *NAFTA* in order to render a decision under paragraph 30.13(1) of the *CITT Act*. This does not mean that the Tribunal held that the construction services covered by the procurement are not subject to the other trade agreements. In any case, the Tribunal’s analysis under *NAFTA* would also apply, *mutatis mutandis*, to the other trade agreements that contain similar provisions.

10. To the extent that the Tribunal concludes that the information provided by Verreault does not disclose a reasonable indication that DCC contravened the relevant provisions of *NAFTA* by declaring its bid non-responsive, on the ground that the bid bond was non-compliant, null and void, it would not be necessary for the Tribunal to examine Verreault’s allegations on the conflict of interest issue in order to dispose of the

11. The Tribunal considers that the requirements stipulated in the tender documentation were clear regarding the information and documents that the bidders had to provide regarding bid security and the possible consequences of non-compliance with these requirements.

12. The “Instructions to Tenderers – DCL 193” (the Instructions), which, as Verreault acknowledged,¹¹ constituted an integral part of the tender documentation, provided as follows:

1 TENDER DOCUMENTS

1.1 The following documents either provided with the tender package or incorporated by reference form part of the tender and any resultant contract:

1.1.1 Tender Form – DCL 150

1.1.2 Standard Construction Contract Documents – DCL 250

1.1.2.1 *Instructions to Tenderers* – DCL 193

1.1.2.2 *General Conditions* – DCL 32

...

3 COMPLETION OF TENDER

3.1 The tender shall:

...

3.1.4 *be accompanied by:*

3.1.4.1 *bid security*, if required, as specified in clause 5;^[12] and

3.1.4.2 *any other document or documents specified elsewhere in the Tender Documents where it is stipulated that they are to accompany the tender.*

3.2 ... Subject to the provisions of 8.5,^[13] failure to provide the information requested in the Tender Documents may render the tender invalid. ...

...

5 BID SECURITY REQUIREMENTS

5.1 Bid security is required when the advertised project budget is greater than \$100,000.00 or, if the advertised project budget is less than \$100,000.00 when specifically called for in the Tender Documents. Bid Security must be in the ORIGINAL form. Fax or photocopies are NOT acceptable. *The Tenderer shall submit bid security with the tender in the form of a bid bond or a security deposit in an amount that is equal to not less than 20 percent of the bid amount. The maximum amount of bid security required with any bid is \$2,000,000.*

complaint. Indeed, non-compliance with the requirements concerning the bid bond in the tender documentation would be sufficient for Verreault’s bid not to be considered in awarding the contract.

11. Complaint at para. 33.

12. The wording of the French version of section 3 of the Instructions refers to section 4. However, the requirements regarding bid security are found at section 5. The Tribunal therefore finds that section 3 should refer to section 5 and not section 4. Indeed, the bid solicitation (complaint, exhibit P-3) confirms this fact since it refers to section 5 when informing potential bidders that bid security is required for published project budgets greater than \$100,000, as in this case. Furthermore, Verreault acknowledges that the requirements regarding bid security were set out in section 5. Complaint at paras. 30-33.

13. The wording of the French version of the Instructions refers incorrectly to paragraph 7.5, a provision that does not exist. A review of the Instructions as a whole, along with the English version, indicates that the relevant provision to which paragraph 3.2 should refer is paragraph 8.5.

- 5.2 *A bid bond shall be in an approved form as described in DCL 32 – General Conditions that form part of the Standard Construction Contract Documents available on the Defence Construction Canada website at http://www.dcc-cdc.gc.ca/english/cc_procurement.html. . .*

. . .

8 ACCEPTANCE OF TENDER

. . .

- 8.5 Defence Construction Canada may, at its sole discretion, waive or cause to be corrected minor irregularities in tenders if Defence Construction Canada determines at its sole discretion that the variation of the tender from the exact requirements set out in the Tender Documents can be corrected or waived without being prejudicial to other Tenderers.

[Emphasis added]

13. Thus the bid bond, which according to clause 5.2 of the Instructions “. . . shall be in an approved form as described in DCL 32 – General Conditions . . .”, is a document that constituted an integral part of the tender documentation and it was compulsory that it accompany Verreault’s bid in this case. That document, which is a standard form entitled “Bid Bond” included in the “General Conditions – DCL 32”, clearly requires the signature of both the natural person or legal entity that agrees to provide the bid bond as surety and the bidder itself as “Principal”.¹⁴

14. On June 20, 2012, Verreault submitted a bid in response to the solicitation. Although it had attached to its bid the “Bid Bond” form required as bid security, the signature of the “Principal”, namely, an authorized representative of Verreault, was missing on this document.

15. On June 19, 2012, DCC informed Verreault that its bid had been declared non-responsive, in particular, on the following ground:

First of all, your bid bond, which accompanied your Tender Form DCL 150, is not compliant. The bid bond submitted is null and void without the signature of the Principal, namely, the representative acting on behalf of [Verreault]. Only a duly signed bid bond will be accepted as a valid bid.¹⁵

[Translation]

16. On July 23, 2012, Verreault submitted an objection to DCC.¹⁶ On the issue of the bid bond, Verreault admitted that it had omitted to sign the required form. However, it maintained that this document did not constitute a bid bond in itself, but rather a notice informing DCC that a bid bond contract had been made and setting out its terms and conditions. Verreault also maintained that DCC could not ignore the fact that it nonetheless had attached to its bid, despite the absence of its signature, a form duly signed by the surety, so that the objective sought in section 5 of the Instructions was fully achieved.

17. Moreover, Verreault stated to DCC that the *Contracting Policy* established by the Treasury Board of Canada Secretariat, as well as Chapter 10 of *NAFTA*, provides that certain types of minor irregularities do not invalidate a bid and that it is possible for a government institution to allow a bidder to correct unintentional errors of form that do not discriminate against the suppliers. Therefore, Verreault requested that DCC allow it to rectify its omission by signing the bid bond form. To that effect, it attached to its objection a new bid bond form, this time duly signed by its authorized representative.

14. Complaint, annexes 6, 11.

15. Complaint, exhibit P-8.

16. Complaint, exhibit P-10.

18. Finally, Verreault asked DCC to postpone the contract award process and to commit to responding to the objection not later than July 26, 2012, or to indicate how soon it could respond to the objection.

19. In a letter dated July 24, 2012, DCC acknowledged receipt of Verreault's letter of objection and indicated that it would respond to it "in due course" [translation]. In the meantime, Verreault learned that, on July 19, 2012, DCC had awarded the contract to another bidder, which DCC confirmed in a letter to Verreault dated July 26, 2012. The Tribunal is of the opinion that, by acting in this manner, DCC clearly denied the relief requested by way of a response to the objection submitted by Verreault.

20. On July 26, 2012, Verreault filed its complaint with the Tribunal within the prescribed time limit. In its complaint, Verreault essentially raised the same arguments as in its objection.

21. In light of the requirements set out in the tender documentation, the Tribunal concludes that the submission of a bid bond ". . . in an approved form as described in DCL 32 – General Conditions . . ." was an essential requirement for a bid, at the time of its opening, to be considered responsive to the criteria set out in the tender documentation. In order to be in the prescribed form, this bid bond had to include not only the signature of the surety but also that of the bidder as "Principal", also committing to DCC, on the same basis as the surety, subject to the conditions set out in the document, to payment of the sum required as bid security.

22. Contrary to Verreault's argument, the Tribunal considers that this document was more than a mere notice informing DCC that a bid bond contract had been made. In fact, this was the bid security in and of itself and, as such, it *had to* accompany the bid according to the Instructions. According to the terms and conditions of the tender documentation, when provided in the form of a bid bond, the bid security must be signed by both the surety and the "Principal".

23. Yet the information provided by Verreault indicates that the bid bond that accompanied the bid, at the time of its opening, did not conform to this essential requirement, since it did not bear the signature of an authorized representative of Verreault as "Principal", requiring it and the surety to jointly and severally pay CDC the sum required as bid security, subject to certain conditions. Moreover, Verreault admits that it omitted to sign the bid bond in a timely manner, namely, before the bid closing date.

24. Therefore, the Tribunal finds that DCC's conclusion that Verreault's bid did not meet this essential requirement specified in the tender documentation is well founded in fact and in law and is therefore reasonable.

25. Although Verreault alleges (1) that its bid, for all intents and purposes, met the requirements of the solicitation, (2) that the objective sought in section 5 of the Instructions was fully achieved, given that it had attached to its bid a bid bond form duly signed by the surety, and (3) that its bid should not have been rejected for an unintentional error of form or due to a "mere minor irregularity" [translation], the Tribunal found, in previous cases where conformity with essential criteria was at issue, that the test was one of strict compliance.¹⁷ The Tribunal finds that the signature of Verreault's authorized representative where indicated on the required bid bond form was fundamental within the context of the procurement in question, because

17. *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 the solicitation documents was one of the cornerstones of the integrity of any tendering system.

it attested to its commitment to DCC as “Principal” and confirmed acceptance by the bidder of the terms and conditions of the bid security that it was submitting in the form of a bid bond.

26. Since the signature of the “Principal” was required on the bid bond form and was therefore necessary for the bid to be declared responsive in accordance with the tender documentation, DCC had the duty to ensure that Verreault’s bid was in full and strict compliance with this requirement.

27. For its part, Verreault had the responsibility to meet this requirement and ensure that the information provided in its bid was complete and clear.¹⁸ In other words, Verreault had the duty to ensure that its bid complied fully with the requirements of the Instructions and the other documents incorporated by reference into the tender documentation, and it was DCC’s responsibility to evaluate Verreault’s full compliance with these requirements.

28. The circumstances of this case are analogous to those of File No. PR-2007-011.¹⁹ In that case, the bid had been rejected because the complainant had omitted to provide the required signature. The bidder maintained that this was only an “insignificant omission”, but the tender documentation indicated that the signature was necessary for the bid to be compliant, and the Tribunal did not find any reasonable indication that the procuring entity had not met its relevant obligations by declaring the bids non-responsive. Upon judicial review, the Federal Court of Appeal upheld the Tribunal’s decision that the signature was compulsory and that “. . . the necessary implication which flows from that conclusion is that the [Tribunal] did not consider the absence of a signature to be a minor irregularity.”²⁰

29. Likewise, in File No. PR-2011-031,²¹ a representative of the complainant, other than the one required under the tender documentation, had signed a form confirming, on behalf of the bidder, that he had read the entire invitation to tender, and attested that all the information provided in the bids was complete and true and that the bidder accepted to be bound by the conditions of the invitation to tender and the subsequent contract. Consequently, in this case, there was a signature affixed in the indicated place but, according to the bids as submitted, this was not the required signature. Since the required signature was essential for the complainant’s bids to be declared compliant with the invitation to tender, the Tribunal decided that its absence, contrary to the complainant’s claims in this matter, was not a minor irregularity. Rather, in the Tribunal’s opinion, this was a fundamental requirement of the solicitation with which the complainant did not comply, as well as a reasonable ground on which the procuring entity had rightly declared that the bids in question were non-responsive. Upon judicial review, the Federal Court of Appeal ruled that the Tribunal’s decision was reasonable.²²

30. In this instance, according to the principles that it set out in the above cases and in view of the information that was available to DCC, the Tribunal finds that there is no reasonable indication that DCC incorrectly evaluated Verreault’s bid concerning the requirements relating to the bid bond. In other words, it was reasonable for DCC to declare that Verreault’s bid did not comply with an essential requirement of the

18. 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).

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

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

21. *Re Complaint Filed by Bell Canada* (26 September 2011) (CITT).

22. *Bell Canada v. Canada (Public Works and Government Services)*, 2012 FCA 162 (CanLII).

tender documentation. Therefore, it was correct, in the circumstances, not to take this bid into consideration in awarding the contract.

31. Concerning Verreault's arguments that DCC is required, in the circumstances, to allow it to correct its unintentional error or "mere minor irregularity" contained in its bid by accepting the bid bond form duly signed by its authorized representative, who transmitted it to DCC on July 23, 2012, the Tribunal considers, on the grounds set out above, that Verreault's omission to submit a bid accompanied by a bid bond form duly signed by its authorized representative does not constitute a minor irregularity, but rather a failure to comply with an essential requirement of the solicitation.

32. In any event, neither the provisions of the *Contracting Policy* nor Articles 1009(2)(b) and 1015(1)(g) of *NAFTA*, on which Verreault relies, impose an obligation on the procuring entities to allow a bidder to correct a minor irregularity or an unintentional error. These provisions only grant the procuring entities the possibility of allowing a bidder to correct such errors in certain circumstances. These provisions in no way indicate that a procuring entity is bound to do so. Moreover, as for Article 1015(1)(g) of *NAFTA*, this provision is irrelevant because it concerns the correction of unintentional errors of form "... between the opening of tenders and the awarding of the contract ...". In this case, Verreault is seeking to correct an error in its bid *after* contract award.

33. It is true that paragraph 8.5 of the Instructions granted DCC, at its sole discretion, the power to waive or cause to be corrected minor irregularities contained in a bid if it determined, at its sole discretion, that the differences between the tender and the exact requirements set out in the tender documents could be corrected or waived without being prejudicial to other bidders. It is clear that DCC did not consider it appropriate to use such discretion in this case. In view of its conclusion that Verreault's failure to submit a duly signed bid bond did not constitute a mere minor irregularity, the Tribunal is not convinced that it has the power to compel DCC to do so or that it would be appropriate or justified, in any case, for DCC to invoke this clause to allow Verreault to remedy its omission in the circumstances.

34. Therefore, the Tribunal concludes that DCC had no obligation to allow Verreault to correct its bid by authorizing it, after the bid closing date, to resubmit or to sign retroactively the required bid bond form.

35. Having determined that the information provided by Verreault does not indicate that DCC contravened the relevant provisions of *NAFTA* by declaring its bid non-responsive on the ground that the bid bond was non-compliant, null and void, and that this ground alone was sufficient for DCC to declare Verreault's bid non-responsive, the Tribunal finds, in the interest of judicial economy, that it is unnecessary to examine Verreault's allegations on the issue of potential conflict of interest in order to dispose of the complaint.

36. For all the reasons set out above, the Tribunal concludes that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the relevant provisions of *NAFTA*.

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

DECISION

38. 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