



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2012-041

Professional Language School

*Decision made  
Friday, February 1, 2013*

*Decision issued  
Monday, February 4, 2013*

*Reasons issued  
Wednesday, February 20, 2013*

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**

**PROFESSIONAL LANGUAGE SCHOOL**

**AGAINST**

**THE DEPARTMENT OF INDUSTRY**

**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.

Ann Penner  
Ann Penner  
Presiding Member

Eric Wildhaber  
Eric Wildhaber  
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*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> 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 Request for a Standing Offer (RFSO) (Solicitation No. IC800081) issued by the Department of Industry (IC) for the provision of full- or part-time French language training to its employees in the National Capital Region on an “as and when requested” basis. Professional Language School (PLS) alleged that IC unfairly declared its proposal non-compliant because it did not submit one original and four copies of the résumés and diplomas of its proposed resources. According to PLS, the wording of the RFSO did not require one original and four copies. Instead, the RFSO only required one copy of each résumé and of the diplomas, which is what PLS submitted.

3. On December 17, 2012, IC informed PLS that it was not the successful bidder. PLS alleged that no reasons were given as to why its proposal was rejected. As a result, PLS asked IC to explain its reasoning later that day. IC proposed to hold a debriefing by conference call on January 22, 2013.

4. During the conference call, IC informed PLS that its proposal had been rejected because it did not include four copies of the résumés and the diplomas, as required in Section I and paragraph 10.4 of the RFSO. IC also told PLS that there were no other criteria for which its proposal had been rejected and informed PLS of its decision not to re-evaluate its proposal.

5. After the conference call, PLS asked IC to re-evaluate its proposal because, in its view, Section I on page 4 of the RFSO requested “1 original and 4 copies” [translation] of the technical proposal, but did not mention that this applied to the criteria enumerated in paragraph 10.4, including the résumés and the diplomas. The same day, IC responded to PLS’s request, referring it to Part I of the general information of the RFSO and the instructions pertaining thereto.

6. On January 23, 2013, PLS again requested that IC confirm whether it intended to re-evaluate its proposal. The same day, IC confirmed to PLS that its proposal did not comply with “Section I – Technical Proposal” [translation] of the RFSO for the following reasons: “You did not provide four résumés, diplomas and certificates with your technical proposals. You provided the information for all the mandatory criteria, as requested, except 10.4. For 10.4 we requested a résumé for each resource per technical proposal . . . This means that all the information must be repeated in all 5 documents. Industry Canada supports the evaluation team’s evaluations. If you wish to make a complaint to the Ombudsman’s Office, you have the right to do so”<sup>3</sup> [translation]. IC confirmed to PLS that it would not re-evaluate its proposal and that PLS was entitled to make a complaint to the Ombudsman if it wished to do so.

7. On January 31, 2013, PLS filed a complaint with the Tribunal within the prescribed time period.

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

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

3. Complaint, Section 5F, “Detailed Statement of Facts and Arguments”, at 2.

## LEGAL FRAMEWORK

8. 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*,<sup>4</sup> Chapter Five of the *Agreement on Internal Trade*,<sup>5</sup> the *Agreement on Government Procurement*,<sup>6</sup> Chapter Kbis of the *Canada-Chile Free Trade Agreement*,<sup>7</sup> Chapter Fourteen of the *Canada-Peru Free Trade Agreement*<sup>8</sup> or Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*<sup>9</sup> applies. In other words, the Tribunal must examine the complaint to determine if there is a reasonable indication that the procuring entity appears to have conducted the procurement in a manner that was in violation of one of the applicable trade agreements. In this case, all but the *AGP* apply.

9. 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.”

10. 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 . . . .” In addition, Article 1015(4)(a) indicates that, “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.” The *CCFTA*, the *CPFTA* and the *CCOFTA* contain similar provisions.

## TRIBUNAL’S ANALYSIS

11. The issue before the Tribunal is whether the information contained in the complaint discloses a reasonable indication that IC did not evaluate PLS’s bid in accordance with the essential conditions specified in the RFSO. To decide that issue, the Tribunal will consider whether IC was wrong to declare PLS’s bid non-compliant on the basis of the number of copies of résumés and diplomas that were provided.

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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) [*NAFTA*].

5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](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](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].

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) [*CCFTA*]. 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) [*CPFTA*].

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) [*CCOFTA*].

12. IC published an RFSO for the provision of full- or part-time French language training to its employees in the National Capital Region on an “as and when requested” basis. The due date for the receipt of bids was October 10, 2012. Bidders were instructed to provide one original and four copies of their technical proposal, one original and one copy of their financial proposal, and one original and one copy of their certifications.

13. On or before the closing date of October 10, 2012, PLS submitted a bid in response to the RFSO. It attached a copy of the résumés and the diplomas to its bid in a separate envelope. PLS did not, however, provide one original and four copies of some of the criteria enumerated in paragraph 10.4 with its technical proposal, including the résumés and the diplomas of its proposed resources.

14. In its complaint, PLS stated that it submitted one original and four copies of its technical proposal, as required by Section I of the RFSO. Regarding mandatory criterion 10.4, it submitted that it attached four envelopes to its bid, including one entitled “Résumés and Diplomas of the Proposed Resources”<sup>10</sup> [translation] and that this envelope contained a copy of the résumés and the diplomas of each proposed resource. Moreover, PLS alleged that nothing in mandatory criterion 10.4 indicated that the bidder had to attach four copies of the résumés and the diplomas. According to PLS, this criterion only stated that a résumé and the diplomas for each proposed resource had to be attached.

15. Part I, entitled “General Information/Conditions” [translation], on page 4 of the RFSO, reads as follows:

**1.0 INSTRUCTIONS FOR THE PREPARATION AND PRESENTATION OF A PROPOSAL**

1.1 The bidders shall prepare their proposal in three (3) distinct sections:

**SECTION I – TECHNICAL PROPOSAL**

(Without reference to the price)

(1 original and 4 copies)

**SECTION II – FINANCIAL PROPOSAL**

(1 original and 1 copy)

**SECTION III – CERTIFICATIONS**

(1 original and 1 copy)

...

1.2 The proposal shall be organized identically to the Request for a Standing Offer and shall refer to the same sections, articles, paragraphs and items of Part I, General Information/Conditions, Part II, Terms of Reference, and Part III, Certifications, as the case may be.

1.3 Before submitting a proposal, the bidder shall obtain clarifications regarding the requirements set out in this document, as needed.

...

[Translation]

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10. Complaint, Section 5F, “Detailed Statement of Facts and Arguments”, at 2.

16. Part II, entitled “Terms of Reference” [translation], on page 26 of the RFSO, reads as follows:

**9.0 EVALUATION PROCEDURES**

9.1 The proposals will be evaluated in three distinct stages, as follows:

- a) Evaluation of the mandatory technical and financial requirements enumerated in paragraph 10.0 below. Only the proposals meeting all the mandatory requirements will proceed to stage b);

...

**Note: Industry Canada may decide to terminate the evaluation of any proposal upon the first finding of non-compliance with a mandatory requirement or the first finding that a proposal does not obtain a minimum score regarding a scored requirement.**

...

**10.0 MANDATORY REQUIREMENTS**

To be declared responsive, the proposal **must** comply with all the mandatory requirements of this invitation to tender. Bids that do not comply with all the mandatory requirements will be rejected. Industry Canada may decide to terminate the evaluation as soon as it finds that the proposal does not comply with a mandatory requirement.

RFSO Reference	Requirement (the bidder’s proposal must reproduce exactly what is stated in the RFSO)	Section/Page of Reference in the Bidder’s Proposal
...		
10.4	<p>The bidder shall attach to its proposal a detailed résumé for each proposed resource (i.e. for the teachers and their substitutes, and the teaching consultants named in the proposal). The résumés shall include the following information:</p> <ul style="list-style-type: none"> <li>• The work experience of the proposed resources;</li> <li>• Copies of the certificates and diplomas of all the proposed resources;</li> <li>• The relevant language qualifications;</li> <li>• The number of years of experience teaching a second language;</li> <li>• The names of two (2) recent references (past three years) for each teacher and consultant, in relation to the work described in the RFSO.</li> </ul> <p>...</p>	

[Translation]

17. The Tribunal considers that the requirements stipulated in the RFSO were clear regarding the number of copies that the bidders had to provide when submitting their technical proposal. Moreover, the obligation to provide one original and four copies of the technical proposal was mandatory, as indicated by the wording of Part I of the RFSO.

18. The Tribunal has no doubt that the mandatory criteria enumerated in paragraph 10.4, including the requirement to submit résumés and the diplomas for each of the proposed resources, were an integral part of the technical proposal. First, subparagraph 9.1(a) indicates that the mandatory technical requirements are enumerated in paragraph 10.0. Second, it is clear that the obligation to provide the résumés and the diplomas was not part of “Section II – Financial Proposal” or “Section III – Certifications”; it is therefore reasonable to believe that the criteria enumerated in paragraph 10.4, including the résumés and the diplomas, were part of the technical proposal. Finally, it seems, according to the complaint, that PLS submitted one original and four copies of each element of paragraph 10.0 except for paragraph 10.4, which indicates to the Tribunal that PLS understood that the mandatory requirements in paragraph 10.0 were part of the technical proposal. Therefore, PLS should have included one original and four copies of the résumés and the diplomas in its technical proposal.

19. In light of the requirements set out in the RFSO, the Tribunal finds that the résumés and the diplomas were an integral part of PLS’s technical proposal. Furthermore, the requirement to provide one original and four copies of the technical proposal was an essential condition for a bid to be considered compliant. The Tribunal has held in previous cases that, when compliance with essential criteria was in question, the issue was whether the criteria had been observed rigorously.<sup>11</sup>

20. PLS had the responsibility to meet all requirements and to ensure that the information provided in its bid was complete and clear.<sup>12</sup> In other words, PLS had the duty to ensure that its bid was completely and rigorously compliant with the requirements set out in the instructions in the documentation of Part I of the RFSO and that IC had the duty to evaluate PLS’s complete and rigorous compliance with these requirements.

21. The Tribunal finds that the instructions of Part I of the RFSO were clear. Even if the instructions had not been clear enough for PLS, it could have requested clarifications to this effect<sup>13</sup> within the time period provided in subparagraph 3.3 of section 3.0, “Communications During the Solicitation Period” [translation], which reads as follows: “Requests for information must be received at least seven (7) business days before the RFSO closing date. Any requests for information received subsequently will not obtain a response before the RFSO closing date”<sup>14</sup> [translation].

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11. *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 solicitation documents is one of the cornerstones of the integrity of any tendering system.

12. 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).

13. See, for example, *Re Complaint Filed by Teledyne DALSA Inc.* (29 November 2012), PR-2012-028 (CITT); *Re Complaint Filed by Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT); *Re Complaint Filed by Primex Project Management Ltd.* (22 August 2002), PR-2002-001 (CITT).

14. RFSO at 6.

22. The Tribunal has indicated in the past that it would not substitute its judgment 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.”<sup>15</sup> There is no evidence that this is the case in this instance.

23. The Tribunal finds that there is no reasonable indication that IC unfairly rejected PLS’s bid on the basis of the number of copies required. On the contrary, the Tribunal finds it was reasonable for IC to declare that PLS’s bid did not conform to an essential condition of the documentation of Part I of the RFSO. Even more, IC was correct under the circumstances not to consider this bid in awarding the contract.

24. Therefore, 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 the applicable trade agreements. As a result, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

## DECISION

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

Ann Penner

Ann Penner

Presiding Member

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15. *Napier-Reid Ltd. v. Department of Public Works and Government Services* (11 December 2012), PR-2012-033 (CITT) at para. 24.