



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-006

Tyco Integrated Security Canada,
Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, September 13, 2013*

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IN THE MATTER OF a complaint filed by Tyco Integrated Security Canada, 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

TYCO INTEGRATED SECURITY CANADA, 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 Tyco Integrated Security Canada, Inc. In accordance with 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.

Ann Penner

Ann Penner

Presiding Member

Dominique Laporte

Dominique Laporte

Secretary

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STATEMENT OF REASONS

SUMMARY

1. On June 17, 2013, Tyco Integrated Security Canada, Inc. (TycoIS) 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. M2989-105860/C) by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) by means of a Request for Proposal (RFP). The solicitation is for the supply and delivery of closed-circuit video equipment and services related to on-site hardware installation, repair, programming and training to approximately 76 RCMP locations in British Columbia.
2. TycoIS alleged that PWGSC improperly declared its proposal non-compliant with the mandatory requirement set out at Annex A, Part C, Section II, Item 06 – “Monitoring/Download Workstation (WS)” (mandatory requirement 06) because it did not demonstrate that the proposed monitoring/download workstation had “. . . a video card with dual digital output interfaces, either DVI or HDMI.”
3. TycoIS claimed that this resulted in a violation of Article 506(6) of the *Agreement on Internal Trade*,² because PWGSC “. . . read-down the functionality of the components included in [TycoIS’s] bid in a manner that was not [in] keeping with industry standards . . .” and, therefore, failed to consider all the information contained in TycoIS’s proposal.
4. For the reasons that follow, the Tribunal’s finds that the complaint is not valid.

COMPLAINT PROCEEDINGS

5. On June 21, 2013, pursuant to subsection 30.13(2) of the *CITT Act* and rule 101 of the *Canadian International Trade Tribunal Rules*,³ 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 for inquiry set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴
6. On July 9, 2013, the Tribunal granted PWGSC an extension of time to file a Government Institution Report (GIR).
7. On July 22, 2013, PWGSC filed a GIR with the Tribunal in accordance with subrule 103(2) of the *Rules*.
8. On July 31, 2013, pursuant to subrule 104(1) of the *Rules*, TycoIS filed comments on the GIR.
9. 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.

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

2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

3. S.O.R./91-499 [*Rules*].

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

PROCUREMENT PROCESS

10. On September 28, 2011, PWGSC published a Letter of Interest (Solicitation No. M2989-105860/A) on MERX. According to the complaint, PWGSC published a Notice of Proposed Procurement (Solicitation No. M2989-105860/B) on MERX, which was last revised on June 15, 2012.
11. PWGSC issued an RFP on March 20, 2012, with a bid closing date of May 1, 2012, which was later extended to June 29, 2012 (the first RFP).
12. ADT Security Services Canada Inc. (ADT) (which is owned by Tyco International Ltd.) submitted a bid in response to the first RFP. In July 2012, as part of a business restructuring, ADT transferred its commercial security business to TycoIS (which is also owned by Tyco International Ltd.).
13. On January 22, 2013, PWGSC advised TycoIS that it would not be awarded a contract and that, since no contract had been awarded pursuant to the first RFP, a new solicitation would be issued.
14. On February 4, 2013, PWGSC published Solicitation No. M2989-105860/C (the second RFP) that is the subject of this complaint. After various amendments, the RFP closed on March 18, 2013.
15. On March 18, 2013, TycoIS submitted a proposal in response to the second RFP.
16. On May 27, 2013, PWGSC advised TycoIS that it would not be awarded a contract because its proposal did not comply with all the mandatory requirements of the second RFP. In particular, PWGSC stated that TycoIS's proposal did not meet the requirements of mandatory requirement 06, as it did not provide sufficient information to demonstrate that the video card had the required dual digital outputs. In the same letter, PWGSC also informed TycoIS that a contract had been awarded to Johnson Controls Canada LP.
17. On May 29, 2013, TycoIS objected by letter to PWGSC's decision regarding compliance with mandatory requirement 06 and provided "additional information" to the contrary.
18. On June 3, 2013, PWGSC responded by e-mail to TycoIS's letter of objection of May 29, 2013, by indicating that it would not revisit the award process. PWGSC also stated that it would not consider the additional information included in TycoIS's letter of objection because it was not provided at bid closing.
19. On June 3, 2013, TycoIS responded to PWGSC's e-mail of June 3, 2013, by advising PWGSC that the additional information contained in TycoIS's letter of May 29, 2013, was not new information but was to serve as "...further clarification that the equipment and production information sheet originally submitted prior to the closing date does comply with specifications."
20. On June 3, 2013, PWGSC sent another e-mail to TycoIS reiterating its view that the bid did not contain sufficient evidence to substantiate compliance with mandatory requirement 06.
21. On June 12, 2013, representatives of TycoIS attended a debriefing with PWGSC. At that meeting, PWGSC confirmed that it had received 12 bids in response to the second RFP, only 3 of which were found to be compliant with the mandatory requirements. PWGSC also confirmed to TycoIS that the only deficiency of its proposal was non-compliance with mandatory requirement 06.
22. Ten working days later, on June 17, 2013, TycoIS filed the present complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

23. 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, is the *AIT*.⁵

24. The issue in this inquiry is whether TycoIS's proposal contained sufficient information and technical specifications to substantiate compliance with mandatory requirement 06, the relevant section of which reads as follows: "The Monitoring/Download workstation must have a video card with dual digital output interfaces, either DVI or HDMI. The display connector interfaces on the video card must be of the same type and be compatible with the display connectors of the supplied monitors."

25. Compliance with all mandatory requirements of solicitation documents is one of the "cornerstones" of maintaining the integrity of any procurement system.⁶ In this case, the second RFP stated that "[t]o be declared responsive, a bid must: (a) comply with all the requirements of the bid solicitation" and, for further clarification, added that "[b]ids not meeting (a) . . . will be declared non-responsive."

26. TycoIS provided a one-page specification sheet from Dell to describe its proposed product: an "off-the-shelf" "Dell OptiPlex 9010 Small Form Factor PC" with "Dual 1GB AMD RADEON HD 7470, w/VGA, OptiPlex, LP (321-0143) video cards."

27. For TycoIS, the information provided on the specification sheet should have allowed the evaluators to determine that its proposed product met mandatory requirement 06. The Tribunal disagrees.

5. According to the contract, the goods being procured are classified under Federal Supply Classification (FSC) group 58. In accordance with Section A of Annex 1001.1b-1 of the *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*], only the goods listed in Section B of that annex purchased by (or on behalf of) the Department of National Defence (DND) are included for coverage. As Section B does not include group 58, this procurement is not covered under *NAFTA*. The General Notes of the *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*] provide that, notwithstanding anything in these annexes, the *AGP* does not apply to procurements in respect of contracts respecting FSC 58; therefore, the procurement is not covered by the *AGP*. In accordance with Section A of Annex Kbis-01.1-3 of the *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*], only the goods listed in Section B of that annex purchased by (or on behalf of) DND are included for coverage. As Section B does not include group 58, this procurement is not covered under the *CCFTA*. The same provisions apply for the *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), the *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/chapter-chapitre-16.aspx>> (entered into force 1 April 2013) and the *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).

6. *IBM Canada Ltd.* (5 November 1999) PR-99-020 (CITT).

28. On its face, the specification sheet does not conform to the language of mandatory requirement 06. Indeed, the Tribunal can find no evidence that TycoIS properly demonstrated, at the time of bid closing, that its proposed product had “. . . a video card with dual digital output interfaces, either DVI or HDMI”, as required by mandatory requirement 06.

29. In the Tribunal’s view, this is not a case of form taking precedence over substance, but a case in which the bidder failed to “connect the dots” by not specifically and completely describing how its proposed product complied with all mandatory requirements. The Tribunal, therefore, sees it as an attempt to hold evaluators responsible for an obligation that falls on each and every bidder in an RFP process, i.e. the responsibility to exercise due diligence in the preparation of a proposal to substantiate compliance with all mandatory requirements in all respects.⁷

30. TycoIS argued that the evaluators’ own purported knowledge of what is in “. . . keeping with industry standards . . .” should have enabled them to conclude that the proposed product was indeed compliant with mandatory requirement 06. However, the Tribunal was not presented with evidence that could allow it to authoritatively determine what would be in “. . . keeping with industry standards . . .” Instead, the Tribunal was presented with opposing arguments to the effect that “dual” could mean DVI and HDMI (TycoIS’ argument) or analogue and digital (PWGSC’s argument).⁸ In the absence of expert evidence, the Tribunal finds both interpretations equally reasonable and, therefore, can neither accept TycoIS’s argument nor overturn PWGSC’s conclusion.

31. Furthermore, the Tribunal cannot accept the logic of TycoIS’s argument that, because the proposed monitors had DVI/HDMI capability, the workstations necessarily did as well.⁹

32. As a result, the Tribunal must conclude that TycoIS did not demonstrate how its proposed product was compliant with all mandatory requirements in all respects. If the product that TycoIS was proposing had both DVI and HDMI capabilities, this could and should have been stated explicitly, much as TycoIS did in its correspondence with PWGSC dated May 29 and June 3, 2013. The Tribunal cannot however consider the additional information provided in that correspondence. Instead, it must view the information as attempts, after bid closing, to bridge the gaps in the proposal—attempts that are tantamount to bid repair.

33. The Tribunal therefore finds that the complaint is not valid.

COSTS

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

35. The Tribunal’s preliminary view is that this complaint has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. The complexity of the procurement itself was medium, as it involved the installation and maintenance, on multiple sites, of off-the-shelf items. The complaint was not complex, as it primarily dealt with one single issue, whether or not PWGSC incorrectly determined that TycoIS’s proposal was non-compliant with the mandatory requirements of the

7. *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 34.

8. GIR, tab 2.

9. Complaint, para. 32.

RFP. The complaint proceedings were not complex, as there were no motions, no hearing, no intervener and no additional submissions by parties.

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

DETERMINATION OF THE TRIBUNAL

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

38. 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 TycoIS. Pursuant to the *Guideline*, 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 article 4.2 of the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Ann Penner

Ann Penner
Presiding Member