



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-012

Access Corporate Technologies
Inc.

v.

Department of Transport

*Determination and reasons issued
Thursday, November 14, 2013*

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IN THE MATTER OF a complaint filed by Access Corporate Technologies 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

ACCESS CORPORATE TECHNOLOGIES INC.

Complainant

AND

THE DEPARTMENT OF TRANSPORT

**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. Each party will bear its own costs in this matter.

Stephen A. Leach

Stephen A. Leach
Presiding Member

Dominique Laporte

Dominique Laporte
Secretary

Tribunal Member: Stephen A. Leach, Presiding Member
Counsel for the Tribunal: Laura Little
Procurement Case Officer: Josée B. Leblanc
Complainant: Access Corporate Technologies Inc.
Government Institution: Department of Transport
Counsel for the Government Institution: Brian Harvey

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
15th Floor
333 Laurier Avenue West
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

SUMMARY

1. On August 27, 2013, Access Corporate Technologies Inc. (ACT) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹
2. The complaint relates to a procurement by the Department of Transport (Transport Canada) (Solicitation No. T8080-130016) for the provision of specialized professional services in support of key priorities within the Marine Safety Directorate and the Marine Security Directorate, including the services of one human resources consultant, two organizational design and classification consultants and two change management consultants.
3. ACT alleged that Transport Canada improperly awarded the contract to another bidder whose proposal did not comply with the mandatory requirements of the solicitation. Specifically, ACT alleged that the successful bidder's proposed resource for the human resources consultant position did not meet the mandatory technical requirement relating to project management experience, as outlined in the Request for Proposal (RFP), which should have, in its view, rendered the bid technically non-compliant.
4. As a remedy, ACT requested the re-evaluation of the successful bidder's proposal, a validation of the experience of the proposed resource in question and the postponement of the contract award.
5. For the reasons that follow, the Tribunal finds that the complaint is not valid.

PROCUREMENT PROCESS

6. On June 17, 2013, a Notice of Proposed Procurement was published on MERX,² which was revised on July 3, 2013. The RFP was issued by Transport Canada under the Task and Solutions Professional Services Supply Arrangement.
7. The bid closing date, originally set for July 11, 2013, was extended to July 16, 2013. According to Transport Canada, three bids were received by the amended closing date, including one from ACT and one from The Associates Group (TAG).
8. On August 1, 2013, Transport Canada advised ACT that its proposal was not selected and that the contract was awarded to TAG.
9. On August 8, 2013, ACT alleged that its proposed resource for one of the organizational design and classification consultant positions told ACT that he had also been included in the TAG's successful bid proposal for the human resources consultant position.³
10. On August 9, 2013, ACT wrote to Transport Canada to request a debriefing in order to address ACT's concerns in light of new information that it had received.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. Canada's electronic tendering service.
3. Additional documents filed by ACT on August 30, 2013.

11. On August 22, 2013, Transport Canada held a debriefing at which ACT objected to the contract award on the basis that TAG's proposed resource for the human resources consultant position did not meet mandatory technical requirement MT2.2 because the proposed resource lacked the required level of project management experience. The next day, ACT confirmed its objection in writing by way of a letter to Transport Canada.

12. On August 27, 2013, Transport Canada responded by e-mail to ACT's letter of objection, indicating that an internal review had confirmed the original evaluation committee's assessment of TAG's proposal and that, therefore, it was continuing its current contract with TAG.

13. On August 27, 2013, ACT filed the present complaint with the Tribunal. On August 30, 2013, the Tribunal advised ACT that additional information was required in order for the complaint to be properly documented. On August 30, 2013, ACT provided the Tribunal with that additional information.⁴

COMPLAINT PROCEEDINGS

14. On September 5, 2013, pursuant to subsection 30.13(2) of the *CITT Act* and rule 101 of the *Canadian International Trade Tribunal Rules*,⁵ the Tribunal informed the parties that the complaint had been accepted for inquiry on September 4, 2013, 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 *Regulations*. The Tribunal also advised the parties that it would not order the postponement of the contract award because the evidence on the record indicated that the contract had already been awarded.

15. On September 13, 2013, Transport Canada acknowledged receipt of the complaint and informed the Tribunal that TAG had been awarded the contract.

16. On September 18, 2013, Transport Canada requested an extension of time of 15 days to file a Government Institution Report (GIR). The Tribunal granted an extension of 5 working days.

17. On October 2, 2013, Transport Canada filed a GIR with the Tribunal in accordance with rule 103 of the *Rules*.

18. On October 15, 2013, pursuant to subrule 104(1) of the *Rules*, ACT filed its comments on the GIR.

19. 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.

RELEVANT PROVISIONS OF THE RFP

20. The RFP contained the following general provisions relating to the preparation of technical offers, evaluation procedures and certifications:

PART 3 – BID PREPARATION INSTRUCTIONS

...

4. The Tribunal determined that the complaint, filed within the time limits prescribed by both subsections 6(1) and (2) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 [*Regulations*], was filed in a timely manner.

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

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 and describe their approach in a thorough, concise and clear manner for carrying out the work.

...

Résumés for Proposed Resources: Unless specified otherwise in the RFP, the technical bid must include résumés for the consultant(s) identified in the bid solicitation that demonstrate that each proposed individual meets the qualification requirements described in the Flexible Grid outlined in Annex A of the Supply Arrangement (including any educational requirements, work experience requirements, and professional designation or membership requirements). . . .

...

Section III: Certifications

Bidders must submit the certifications required under Part 5.

...

PART 4 - EVALUATION PROCEDURES AND BASIS OF SELECTION**1. Evaluation Procedures**

- (a) Bids will be assessed in accordance with the entire requirement of the bid solicitation including the technical evaluation criteria.

...

2.1 Basis of Selection – Highest Combined Rating of Technical Merit 70% and Price 30%

2.1.1 To be declared responsive, a bid must:

- (a) comply with all the requirements of the bid solicitation;
- (b) meet all the mandatory evaluation criteria; and
- (c) obtain the required minimum number of points specified in Attachment 1 to Part 4 for the point rated technical criteria.

2.1.2 Bids not meeting (a) or (b) or (c) will be declared non-responsive. Neither the responsive bid obtaining the highest number of points nor the one with the lowest evaluated price will necessarily be accepted.

...

PART 5 – CERTIFICATIONS

Bidders must provide the required certifications to be awarded a contract. Canada will declare a bid non-responsive if the required certifications are not completed and submitted as requested. Bidders should provide the required certifications in Section III of their bid.

Compliance with the certifications bidders provide to Canada is subject to verification by Canada during the bid evaluation period (before award of a contract) and after award of a contract. The Contracting Authority will have the right to ask for additional information to verify the bidders' compliance with the certifications before award of a contract. The bid will be declared non-responsive if any certification by the Bidder is untrue, whether made knowingly or unknowingly. Failure to comply with the certifications or to comply with the request of the Contracting Authority for additional information will also render the bid non-responsive.

...

ATTACHMENT 1 TO PART 5
CERTIFICATIONS REQUIRED WITH THE BID

...

1.4 Education and Experience

The Bidder certifies that all the information provided in the résumés and supporting material submitted with its bid, particularly the information pertaining to education, achievements, experience and work history, has been verified by the Bidder to be true and accurate. Furthermore, the Bidder warrants that every individual proposed by the Bidder for the requirement is capable of performing the Work described in the resulting contract.

Certification

By submitting a bid, the Bidder certifies that the information submitted by the Bidder in response to the above requirements is accurate and complete.

21. The relevant mandatory technical criteria as set out in the RFP, including addendum No. 7, read as follows:

ATTACHMENT 1 TO PART 4
MANDATORY & TECHNICAL CRITERIA

1.1.1 Mandatory Technical Criteria

The bid must meet the mandatory technical criteria specified below. The Bidder must provide the necessary documentation to support compliance with this requirement.

Bids which fail to meet the mandatory technical criteria will be declared non-responsive. Each mandatory technical criterion should be addressed separately.

...

For the purpose of the mandatory technical criteria specific below, the experience of the Bidder will be considered.

...

MT1- The Bidder

...

MT1.1 Bid Proposal – Proposed Resources

The Bidder MUST name and provide detailed curriculum Vitae (CV) for:

- a) One (1) Human Resource Consultant
- b) One (1) Change Management Consultant
- c) Two (2) Organizational Design and Classification Consultant

It is the sole responsibility of the Bidder to ensure that the submitted CV's are sufficiently detailed to enable a full evaluation of the proposed resources. Failure to provide sufficient information may render the bid non-compliant and the Proposal will be given no further consideration.

...

MT2 - The Bidder's Proposed Resources – HUMAN RESOURCES CONSULTANT – Level 3

...

MT2.2 The Bidder **MUST** provide a profile demonstrating the HR Consultant's experience in Project Management (**min. 10 years' experience** – either consecutively or collectively – obtained within the last 15 years). . . .

POSITIONS OF PARTIES

ACT

22. ACT alleged that TAG's proposed resource for the human resources consultant position did not have a minimum of 10 years' experience in project management and, therefore, could not have complied with mandatory technical requirement MT2.2 of the RFP. This particular requirement calls for the resource to have at least 10 years of project management experience obtained (either consecutively or collectively) within the last 15 years.

23. According to ACT, it had originally considered the same person for the human resources consultant role in its own proposal, but a reference check revealed that the person did not have the required level of project management experience to qualify for that position. In support of this allegation, ACT provided a summary of its reference check (dated "July 8th"), which indicated that the resource in question had only 28 months (or 4.8 years) of relevant project management experience. As a result, ACT decided to propose him for one of the organizational design and classification consultant positions instead.

24. ACT submitted that Transport Canada failed to properly apply the mandatory technical requirements of the RFP in evaluating TAG's proposal. It also alleged that Transport Canada should have conducted a re-evaluation of TAG's proposal, including a validation of the proposed resource's project management experience, in light of the concerns raised by ACT following the award of contract.

Transport Canada

25. In the GIR, Transport Canada submitted that the complaint is without merit. Pursuant to the terms of the RFP, it claimed that it was entitled to rely on TAG's certification that the information submitted regarding the proposed resource's experience was accurate and complete. It referred to the fact that the RFP did not stipulate that reference checks would be conducted, nor did it oblige Transport Canada to otherwise verify the information submitted in any bidder's proposal.

26. Although Transport Canada claimed that it had no obligation to check the validity of the certifications contained in TAG's proposal, it also submitted that it found no evidence before the evaluators that would have led them to exercise their right to conduct a verification. Furthermore, given that ACT only raised its concerns about TAG's alleged non-compliance with mandatory technical requirement MT2.2 of the RFP after the contract was awarded, even if Transport Canada were to decide that a verification was warranted, it would be an issue of contract administration falling outside the Tribunal's jurisdiction.

ACT's Reply

27. In its comments on the GIR, ACT submitted that, even before it made its objection, Transport Canada had reason to doubt the veracity of the proposed resource's project management experience, as set out in TAG's bid proposal, given that the same resource was put forward by ACT for a different position that did not require the same level of experience. In ACT's view, Transport Canada should have done a verification of the proposed resource's experience in light of this apparent discrepancy.

28. ACT argued that Transport Canada had an obligation to address the false certification made by TAG, by exercising its authority under the terms of the RFP to declare TAG's bid non-responsive (i.e. prior to the award of contract) or, later, to terminate the contract award for default.

29. ACT submitted that to allow TAG to keep the contract on the basis of a false certification not only is unfair to the unsuccessful bidders in this solicitation process but also impedes the integrity and efficiency of the overall procurement system.

TRIBUNAL'S ANALYSIS

30. 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. Subsection 30.14(2) of the *CITT Act* requires the Tribunal to 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.

31. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *Agreement on Internal Trade*,⁶ the *North American Free Trade Agreement*,⁷ *Agreement on Government Procurement*,⁸ the *Canada-Chile Free Trade Agreement*,⁹ the *Canada-Peru Free Trade Agreement*,¹⁰ the *Canada-Colombia Free Trade Agreement*¹¹ and the *Canada-Panama Free Trade Agreement*.¹²

Relevant Provisions of the Applicable Trade Agreements

32. The Tribunal has narrowed its inquiry to the relevant provisions of the *AIT*, *NAFTA* and the *AGP*, given that the other applicable trade agreements contain provisions similar to those found in *NAFTA*.

33. 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.”

34. Article 1013(1) of *NAFTA* provides that “[w]here an entity provides tender documentation to suppliers, the documentation shall contain . . . (g) a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification

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

7. *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*].

8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

9. *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.

10. *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).

11. *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).

12. *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/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

and . . . (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders”

35. Article 1015(4) of *NAFTA* provides that, “(a) 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;” and that “(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation”.

36. Article XIII(4) of the *AGP* provides that “(a) [t]o be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation” and that “(c) [a]wards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.”

Did Transport Canada Improperly Evaluate the Winning Bidder’s Proposal?

37. The issue in this inquiry is whether Transport Canada failed to evaluate the winning bidder’s proposal in a manner consistent with the mandatory requirements of the RFP and, as a result, breached the provisions of the applicable trade agreements in finding that the proposed resource’s experience complied with mandatory technical requirement MT2.2 of the RFP.¹³

38. The Tribunal has long recognized that “. . . compliance by potential suppliers with all the mandatory requirements of solicitation documents is one of the cornerstones to maintaining the integrity of any procurement system” and that, “[t]herefore, procuring entities must evaluate bidders’ conformance with the mandatory requirements thoroughly and strictly.”¹⁴

39. It is also well established that bidders bear the onus of demonstrating compliance with mandatory criteria. Accordingly, it is incumbent upon a bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant with all essential elements of a solicitation.¹⁵ Where a solicitation requires bidders to certify certain information in their proposal for accuracy and completeness, the procuring entity is entitled to rely on those certifications at the time of bid evaluation.¹⁶

40. The Tribunal is of the view that, unless the evaluators have not applied themselves reasonably 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, it will not interfere and substitute its judgment for that of the evaluators.¹⁷

13. The grounds of complaint and, therefore, the Tribunal’s analysis were focused on the issue of whether Transport Canada properly evaluated TAG’s proposal for compliance with mandatory technical requirement MT2.2. There were no allegations or information before the Tribunal in relation to any of the other essential elements of TAG’s proposal or their evaluation by Transport Canada.

14. *IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT) at 7.

15. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) [*Excel*] at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.

16. *Central Automotive Inspections Records & Standards Services (CAIRSS) Corp.* (31 October 2012), PR-2012-025 (CITT) at paras. 24-25. See, also, *Sanofi Pasteur Limited* (12 May 2011), PR-2011-006 (CITT) at paras. 22-23; *Airsolid Inc* (18 February 2010), PR-2009-089 (CITT) at para. 11.

17. *Excel* at para. 33. See, also, *Valcom Ltd. (Ottawa)* (2 December 2002), PR-2002-014 (CITT).

41. In this case, the Tribunal has determined that Transport Canada, in evaluating the proposals and awarding a contract, was entitled to rely on TAG's certification that the proposed resource met the mandatory technical requirement MT2.2 of the RFP of having at least 10 years' experience in project management over the last 15 years. It was clear on the face of the RFP that, by submitting a bid proposal, the bidder certified that the information in response to the mandatory requirements was verified by the bidder to be true, accurate and complete.

42. The Tribunal is not persuaded by ACT's argument that the fact that the same resource was proposed by two different bidders for two different positions should have raised a red flag with respect to that resource's qualifications and, therefore, obliged Transport Canada to conduct a verification. The Tribunal finds that the complaint (i.e. that TAG's certification was false) does not present any evidence that Transport Canada's conclusion was not reasonable or was inconsistent with the requirements of the RFP.

43. Pursuant to the provisions of the RFP, the contracting authority has the right (but is not obliged) to ask for additional information to verify the bidders' compliance with the certification before or after the award of a contract. In the Tribunal's view, there is no indication that Transport Canada had any reason to question TAG's certification during the bid evaluation phase, and it was entitled to rely on TAG's certification of the information contained in the proposed resource's CV. Accordingly, the evaluators had no obligation to conduct a verification of the proposed resource's experience in evaluating TAG's proposal for conformity with mandatory technical requirement MT2.2 of the RFP.

44. The parties do not dispute that ACT's concerns in relation to TAG's proposal were only raised with Transport Canada after the contract was awarded, on the basis of information subsequently discovered by ACT. If it became known to Transport Canada after the award of contract that TAG did not in fact meet the mandatory technical requirement, which Transport Canada does not admit, it would nevertheless be an issue of contract administration falling outside the Tribunal's jurisdiction.¹⁸

45. In sum, having carefully reviewed the evidence before it, the Tribunal sees no reason to interfere with the judgment of the evaluators. The Tribunal finds that they assessed the compliance of TAG's proposal with mandatory technical requirement MT2.2 of the RFP thoroughly and strictly in conformity with the terms of the RFP and the relevant provisions of the applicable trade agreements.

46. On the basis of the foregoing, the Tribunal therefore finds that the complaint is not valid.

COSTS

47. Section 30.16 of the *CITT Act* allows the Tribunal to award costs to complainants or government institutions. In determining whether costs should be awarded to the successful party in this case, the Tribunal considers that, although it concluded that the complaint was not valid for the reasons given above, Transport Canada did not request to be awarded its reasonable costs in this matter. Therefore, in these circumstances, no costs will be awarded.

18. Subsection 30.11(1) of the *CITT Act* and subsection 7(1) of the *Regulations* allow a potential supplier to file a complaint with the Tribunal about any aspect of a procurement process for a designated contract. Contract administration is a separate phase that takes place after the procurement process is completed. It deals with issues that arise as a contract is performed and managed. The Tribunal has been clear that matters of contract administration are beyond the scope of its jurisdiction. See, for example, *Sunny Jaura O/A Jaura Enterprises* (21 February 2013), PR-2012-043 (CITT) at para. 10. Complaints regarding contract administration are within the mandate of the Office of the Procurement Ombudsman.

DETERMINATION OF THE TRIBUNAL

48. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. Each party will bear its own costs in this matter.

Stephen A. Leach

Stephen A. Leach
Presiding Member