



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-025

Hendrix Hotel & Restaurant
Equipment & Supplies Ltd.

*Decision made
Tuesday, December 10, 2013*

*Decision issued
Wednesday, December 11, 2013*

*Reasons issued
Tuesday, December 17, 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, c. 47 (4th Supp.).

BY

HENDRIX HOTEL & RESTAURANT EQUIPMENT & SUPPLIES LTD.

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.

Ann Penner
Ann Penner
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.

SUMMARY OF THE COMPLAINT

2. The complaint relates to a Request for Proposal (RFP) (Solicitation No. 21120-133426/A) which was issued on August 7, 2013, by the Department of Public Works and Government Services (PWGSC) on behalf of the Correctional Service of Canada for the supply of cook chill equipment and the provision of related services, namely, installation consultation, recipe development and assistance with the development of a food safety plan.

3. In its complaint, Hendrix Hotel & Restaurant Equipment & Supplies Ltd. (Hendrix) alleged that PWGSC incorrectly rejected its proposal by determining that it did not comply with the mandatory requirements of the tender documentation. Specifically, Hendrix took issue with PWGSC's decision that its proposal did not provide references to a previous project in which Hendrix demonstrated the ability to provide services in the development of a food safety plan. Hendrix argued that "recipe development and food safety plan" should have been seen as a single mandatory criterion rather than two separate ones, as suggested by PWGSC. Had a single criterion been applied, Hendrix insisted its proposal would have been fully compliant with the RFP.³

BACKGROUND INFORMATION

4. PWGSC issued a number of amendments after the RFP was issued on August 7, 2013. Four of those amendments extended the deadline for the submission of proposals to what ultimately became October 21, 2013. Several other amendments clarified or modified the requirements in the RFP. Amendment No. 6, for example, replaced the mandatory requirement regarding the three "cook chill related services" with the following:

1.2 Cook Chill related services, ("installation consultation", "recipe development" and "food safety plans"):

The Bidder must provide details of a sufficient number of projects completed to give **at least 1 example** of each cook chill related services required. These projects [may be] different than the equipment projects to take into consideration unique service related projects.

The Bidder **must** include, as a minimum, the following details for each project submitted:

...

c. Identify 1 or more related services for each project ("installation consultation", "recipe development" and "food safety plans")

d. Contact information for the person of reference who can verify the work

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. Complaint, Appendix B, section 5F.

5. On October 25, 2013, PWGSC e-mailed Hendrix to request clarification as to where, in the proposal, it could find the description of a project that demonstrated compliance with the required “food safety plans”.

6. On October 29, 2013, Hendrix replied to PWGSC, indicating that “. . . menu creation and the food safety plan are so integral to the process of supplying cook/chill equipment that it does not register as something which merits a specific response.” Further, it stated that the manufacturer found the request of the contracting authority to be “uncommon”.⁴

7. PWGSC responded to Hendrix’s e-mail that same day, asking whether the information in Hendrix’s reply had actually been included in the proposal. If not, the information could be taken as “bid repair”. Hendrix responded by pointing to particular information in its proposal and stating that the intent of its earlier e-mail “. . . was to provide [PWGSC] with an explanation of [its] working definition for the phrase ‘working with recipe development’.”⁵

8. In subsequent e-mails between the parties, Hendrix reiterated its position that the reference to “recipe development” in its proposal met the singular criterion “recipe development and food safety plans”. On October 31, 2013, PWGSC responded by stating that information regarding food safety plans “. . . was not addressed in your proposal and it had to be.”⁶

9. On November 4, 2013, Hendrix asked whether any compliant bids had been received. PWGSC replied that the evaluation process was underway.

10. On November 21, 2013, PWGSC e-mailed Hendrix to explain that its proposal had been rejected.

11. On December 4, 2013, Hendrix filed its complaint with the Tribunal.

TRIBUNAL ANALYSIS

12. Upon receipt of a complaint which complies with subsection 30.11(2) of the *CITT Act*, the Tribunal must decide whether it meets certain conditions before conducting an inquiry. The first condition is that the complaint be filed within the time limits prescribed by section 6 of the *Regulations*.

13. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.”

14. Subsection 6(2) of the *Regulations* states that a potential supplier who has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

15. These provisions make it clear that a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.

4. Complaint, Appendix F.

5. *Ibid.*

6. *Ibid.*

16. As explained above, the parties exchanged numerous e-mails regarding whether and where Hendrix had referred to “food safety plans” in its proposal. Most notably, in its email of October 31, 2013, PWGSC stated the following:⁷

Thank you for the email but unfortunately, this information [regarding food safety plans] was not addressed in your proposal and it had to be. The mandatory requirement is very clear on what [bidders] needed to address under this particular mandatory: **Cook Chill related services, “installation consultation”, “recipe development” and “food safety plans”**: The Bidder must provide details of a sufficient number of projects completed to give at least 1 example **of each cook chill related services** required.

I even went as far to remind bidders of the Mandatories in Amendment #004 of the RFP by stating: **NOTE TO ALL BIDDERS REGARDING THE TECHNICAL EVALUATION**: Please ensure the Mandatory Technical Criteria, under Part 4 of this RFP, is carefully reviewed and all points are addressed. Any bid which fails to meet the mandatory technical criteria will be declared non-responsive.

As well, this requirement was originally posted in August and did not close until October 21st so there was ample opportunity for questions to be asked If there are any questions you have about any of the RFP content, they must be sent to the Contracting Authority during the tender period. There is nothing more frustrating from a buyer’s perspective [than] to set aside a bid because of missed mandatories.

17. PWGSC’s message clearly indicated that Hendrix’s proposal did not comply with a mandatory bidding requirement and therefore would be declared non-responsive. In the Tribunal’s view, Hendrix knew or should have known the basis of its complaint on the date on which it received this e-mail (i.e. October 31, 2013). That Hendrix knew that its proposal had not met a mandatory technical criterion was confirmed by the e-mail it sent on November 4, 2013, in which it asked PWGSC whether it had “received any compliant bids”.

18. Pursuant to subsection 6(1) of the *Regulations*, Hendrix had to file a complaint with the Tribunal or an objection with PWGSC within 10 working days of receiving the e-mail of October 31, 2013. Since it did neither within the 10-day period, the complaint is time-barred, and the Tribunal cannot initiate an inquiry.

19. Even if Hendrix had filed its complaint within the 10-day period, the Tribunal is of the view that the complaint does not disclose a reasonable indication of a breach of an applicable trade agreement. The RFP and the amendments were clear that a bidder had to address each of the cook chill related services. Furthermore, the tender documentation clearly delineated three separate services by the use of quotation marks around “installation consultation”, “recipe development” and “food safety plans”. Therefore, PWGSC’s evaluation of Hendrix’s proposal was rightly based on the three mandatory criteria in the RFP.

20. Moreover, if Hendrix had any concerns regarding the proper interpretation of the mandatory requirements, it had the opportunity to ask questions before bid closing. It chose not to do so.

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

7. *Ibid.*

DECISION

22. 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