



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2013-027

Unisource Technology Inc.

*Decision made
Friday, December 13, 2013*

*Decision issued
Monday, December 16, 2013*

*Reasons issued
Wednesday, January 15, 2014*

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

UNISOURCE TECHNOLOGY INC.

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.

Serge Fréchette
Serge Fréchette
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. W8482-145918/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the supply of motors.³

3. Unisource Technology Inc. (Unisource) submitted a proposal, which was found to be non-compliant with all the mandatory requirements set forth in the Request for Proposal (RFP). Unisource alleges the following:

- the evaluation was improper and incorrect;
- the evaluators failed to contact Unisource for clarification; and
- PWGSC awarded the contract for a much higher price to another bidder.

4. As a remedy, Unisource requests that the Tribunal order PWGSC to postpone the award of the contract and that the contract be awarded to Unisource.

LEGAL FRAMEWORK

5. 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*,⁴ Chapter Five of the *Agreement on Internal Trade*,⁵ the *Agreement on Government Procurement*,⁶ Chapter Kbis of the *Canada-Chile Free Trade Agreement*,⁷ Chapter Fourteen of the *Canada-Peru Free Trade Agreement*,⁸

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

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

3. The complaint was filed in accordance with the requirements of subsection 30.1(2) of the *CITT Act* on December 9, 2013.

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> [*AIT*].

6. 15 April 1994, online: World Trade Organization <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*].

Chapter Fourteen of the *Canada-Colombia Free Trade Agreement*⁹ or Chapter Sixteen of the *Canada-Panama Free Trade Agreement*¹⁰ applies. In other words, the Tribunal must examine the complaint to determine if there is a reasonable indication that the procuring entity conducted the procurement in a manner that was in violation of one of the applicable trade agreements. In this case, all trade agreements apply.

6. Article 506(6) of the *AIT* provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The 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.” The *AGP*, *NAFTA*, the *CCFTA*, the *CPFTA*, the *CCOFTA* and the *CPAFTA* have a similar obligation.

7. The Tribunal will not substitute its judgment for that of 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.¹¹

TRIBUNAL’S ANALYSIS

8. The issue before the Tribunal is whether the complaint discloses a reasonable indication that PWGSC did not evaluate Unisource’s bid in accordance with the evaluation criteria of the RFP. To decide that issue, the Tribunal will consider whether PWGSC was wrong to declare Unisource’s bid non-compliant on the basis that its bid failed to provide all the information requested to allow PWGSC to fully evaluate equivalency.

9. Part 3 of the RFP, which is titled “**BID PREPARATION INSTRUCTIONS**”, provides as follows:

1.1 Equivalent Products

1. Products that are equivalent in form, fit, function and quality to the item(s) specified in the bid solicitation will be considered where the Bidder:

...

(c) provides complete specifications and descriptive literature for each substitute product with the bid;

(d) provides compliance statements that include technical specifics showing the substitute product meets all mandatory performance criteria that are specified in the bid solicitation; and

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*].

10. *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) [*CPAFTA*].

11. See, for example, *MTS Allstream Inc. v. Department of Public Works and Government Services* (3 February 2009), PR-2008-033 (CIIT) at para. 26.

- (e) clearly identifies those areas in the specifications and descriptive literature that support the substitute product's compliance with any mandatory performance criteria.

...

- 2. Products offered as equivalent in form, fit, function and quality will not be considered if:
 - (a) the bid fails to provide all the information requested to allow the Contracting Authority to fully evaluate the equivalency of each substitute product; or
 - (b) the substitute product fails to meet or exceed the mandatory performance criteria specified in the bid solicitation for that item.

10. Part 4 of the RFP, which is titled “**EVALUATION PROCEDURES AND BASIS OF SELECTION**”, provides as follows:

Evaluation Criteria

All bids must be completed in full and provide all of the information requested in the bid solicitation to enable full and complete evaluation.

1.1 Technical Evaluation

1.1.1 Mandatory Technical Criteria

The following Mandatory requirements must be submitted with the bid for evaluation

Technical compliance (description of items 001 to 004 from pages 3 to 6 herein);
Bids must be submitted for all destinations per NSN.

11. Thus, when proposing an equivalent product, it was incumbent on the bidder to provide in full the technical information set forth in article 1.1 of Part 3 of the RFP.

12. In its regret letter, PWGSC informed Unisource that its bid was not responsive because it failed to provide adequate detail to evaluate the equivalency of its proposed product. In addition, Unisource states that, at the debriefing, PWGSC explained that the bid lacked the physical dimensions of the proposed product. Unisource does not deny that it failed to submit this information.

13. In addition, it seems from the information that Unisource filed with the Tribunal that no descriptive literature was submitted with the bid with respect to the items 001 to 004.

14. Therefore, on the face of the complaint, the bid was not compliant with the mandatory requirements of the RFP.

15. Nonetheless, Unisource states that the evaluators did not act in accordance with the trade agreements because the requisite information was in guidelines that the evaluators should have had on hand and of which they should have been well aware. Unisource adds that it had successfully bid on earlier contracts after submitting the same kind of technical information and that the evaluators should have sought clarification from Unisource before concluding that its bid was not technically compliant.

16. However, when responding to a solicitation, the onus is on the bidder to demonstrate that it meets all the mandatory requirements of the procurement.¹² In addition, bidders must treat each solicitation

12. *Thomson-CSF Systems Canada Inc.* (12 October 2000), PR-2000-010 (CITT); *Canadian Helicopters Limited* (19 February 2001), PR-2000-040 (CITT); *WorkLogic Corporation* (12 June 2003), PR-2002-057 (CITT).

independently and should be governed by the express terms set out for a particular solicitation. For its part, when evaluating a bid, the government institution must ensure the bid thoroughly and strictly complies with the mandatory requirements identified in the tender documents.¹³ Evaluators simply cannot depend upon extraneous knowledge or information when it is a mandatory requirement of the RFP that such information be submitted.

17. Furthermore, there was no obligation to seek clarification. Part 2 of the RFP incorporates, by reference, article 16 of PWGSC's 2003 "Standard Instructions – Goods or Services – Competitive Requirements" document, which provides that Canada has no obligation to seek clarification or verification from bidders regarding any information provided by them with respect to the bid solicitation.

18. Therefore, the complaint does not disclose a reasonable indication that the procurement breached the applicable trade agreements.

DECISION

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

Serge Fréchette

Serge Fréchette
Presiding Member

13. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15611 (FCA).