



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

---

## DETERMINATION AND REASONS

File No. PR-2018-005

DSS Marine Inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Wednesday, August 15, 2018*

*Reasons issued  
Thursday, August 30, 2018*

**TABLE OF CONTENTS**

DETERMINATION..... i

STATEMENT OF REASONS ..... 1

    INTRODUCTION ..... 1

    SUMMARY OF THE COMPLAINT ..... 1

    BACKGROUND ..... 1

    RELEVANT PROVISIONS OF THE RFP ..... 2

    DSS MARINE’S PROPOSAL ..... 3

    POSITIONS OF THE PARTIES ..... 4

    ANALYSIS ..... 4

    COSTS ..... 7

    DETERMINATION ..... 7

IN THE MATTER OF a complaint filed by DSS Marine Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

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**

**DSS MARINE 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. No costs shall be awarded to either party.

Peter Burn  
\_\_\_\_\_  
Peter Burn  
Presiding Member

The statement of reasons will be issued at a later date.

Tribunal Panel:	Peter Burn, Presiding Member
Support Staff:	Martin Goyette, Counsel
Complainant:	DSS Marine Inc.
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clark Ian McLeod Kathryn Hamill Roy Chamoun Mani Taheri

Please address all communications to:

The Registrar  
Secretariat to the Canadian International Trade Tribunal  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario K1A 0G7  
Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [citt-tcce@tribunal.gc.ca](mailto:citt-tcce@tribunal.gc.ca)

## STATEMENT OF REASONS

### INTRODUCTION

[1] On May 18, 2018, DSS Marine Inc. (DSS Marine) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned a Request for Proposal (RFP) (Solicitation No. W0100-18J057/A) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the supply of 10 containerized hydraulic boom reels.

[2] On May 23, 2018, the Tribunal requested, as a point of clarification, that the complainant file additional information concerning its complaint. On May 24, 2018, DSS Marine filed the requested additional information with the Tribunal.

[3] On May 25, 2018, the Tribunal decided to conduct an inquiry into the complaint, having determined that it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

[4] The Tribunal inquired into the validity of the complaint, as required by sections 30.13 to 30.15 of the *CITT Act*. For the reasons set out below, the Tribunal finds that the complaint is not valid.

### SUMMARY OF THE COMPLAINT

[5] DSS Marine alleged that PWGSC erred in determining that its proposal was non-compliant with a mandatory technical requirement of the RFP—mandatory technical requirement item No. 14—requiring that the proposed boom reels be equipped with three hydraulic hoses connecting the reels to the power pack.

[6] DSS Marine requested that the contract award decision be reversed, that the contract be terminated and that it be awarded to DSS Marine.

### BACKGROUND

[7] The RFP was published on December 22, 2017, with a closing date of January 31, 2018, later postponed to February 20, 2018.<sup>3</sup> DSS Marine submitted a proposal in response to the RFP on February 20, 2018.

[8] The conformity of the bids with the mandatory technical requirements was assessed by a team of DND evaluators.

[9] On May 9, 2018, the contract was awarded to Griffin Engineered Systems. On May 10, 2018, PWGSC notified DSS Marine by e-mail that it would not be awarded the contract. In the e-mail,

---

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

2. SOR/93-602 [*Regulations*].

3. Amendment No. 008 to the RFP, Exhibit 2 to the Government Institution Report (GIR).

PWGSC informed DSS Marine that its bid had been determined to be non-compliant on the ground that it failed to meet two technical requirements in the RFP: items No. 14 and 18. With respect to item No. 14, PWGSC wrote the following:

Does not meet specifications. We require 3 hydraulic hoses. We asked for this specifically.<sup>4</sup>

[10] On May 11, 2018, DSS Marine sent a letter of objection to PWGSC and requested a debriefing. A telephone debriefing was held on May 15, 2018. PWGSC admitted during the debriefing, and conceded before the Tribunal, that the evaluation of DSS Marine's bid with respect to the second requirement, item No. 18, was erroneous. However, PWGSC maintained that the evaluators' determination that the bid was non-compliant with item No. 14 was correct.

## **RELEVANT PROVISIONS OF THE RFP**

[11] The RFP stated that the responsive bid with the lowest evaluated price would be recommended for contract award. In addition, the RFP contained language requiring that a bid "pass" all the mandatory technical requirements and that the bidder provide a reference as to where, in its proposal, it stated that it met the requirements. The RFP also indicated that PWGSC was under no obligation to seek clarifications from bidders. The relevant provisions of the RFP provided as follows:

### **4.1.1 Technical Evaluation**

#### **4.1.1.1 Mandatory Technical Criteria**

Mandatory Evaluation Criteria for the technical bids are included in Annex A1, Technical Statement of Requirements (TSOR).

- a) The criteria in the TSOR will be used to assess whether a bid meets the Mandatory Technical Requirements
- b) The bid will be assessed against the requirements shown in Table 1 "Mandatory Technical Requirements" and assigned a "PASS" or "FAIL" designation.
- c) For each and every Mandatory requirement listed in Table I, the Contractor must provide a reference as to where in there (sic) proposal it states they have met the Mandatory Requirement.
- d) A compliant bid must PASS all "Mandatory Technical Requirements."<sup>5</sup>

...

### **4.2.1 Basis of Selection- Mandatory Technical Criteria**

---

4. May 10, 2018, e-mail from PWGSC to DSS Marine, Complaint and Exhibit 6 to the GIR.  
5. RFP, Part 4, Evaluation Procedures and Basis of Selection, Section 4.1.1, Technical Evaluation, Exhibit 1 to the GIR.

A bid must comply with the requirements of the bid solicitation and meet all mandatory technical evaluation criteria to be declared responsive. The responsive bid with the lowest evaluated price will be recommended for award of a contract.<sup>6</sup>

...

#### ANNEX "A1"

##### Mandatory Technical Requirements

Bids will be assessed against the requirements shown in Table 1 Mandatory Technical Requirements and assigned a pass or fail designation. A compliant bid must pass all Mandatory Technical Requirements to be deemed technically compliant.

**For each and every Mandatory requirement listed in Table 1, the Contractor must provide a reference as to where in their Proposal it states they have met the Mandatory Requirement.** A compliant bid must PASS all "Mandatory Technical Requirements".

#### **Bidders must complete the table below or be deemed non-compliant.**

**Note: The Crown is under NO obligation to seek clarification of the bid(s) or the supporting technical documentation provided. Failure to meet any of the following will render your proposal non-compliant and will be given no further consideration**<sup>7</sup>

[12] Mandatory technical requirement item No. 14, regarding the supply of three hydraulic hoses, read as follows:

Hydraulic Hose Set 10 metres for Boom reel with load control valve (standard Hydraulic Hose set – 3 pcs 3/8" with hydraulic quick connection, 3/8 TEMA 3821/3811)<sup>8</sup>

#### DSS MARINE'S PROPOSAL

[13] DSS Marine's bid contained the following statement:

Bidder has thoroughly reviewed the delivery requirements of this tender and confirms that it has the experience, skill, knowledge, personnel, quality systems and production equipment to

---

6. RFP, Section 4.2.1, Basis of Selection – Mandatory Technical Criteria.

7. RFP, Annex A1, Mandatory Technical Requirements. Table 1 contained a list of the mandatory technical requirements and provided space for the bidder to indicate, in respect of each of requirement, the "reference technical document and page number". Concerning the indication that PWGSC was under no obligation to seek clarifications, see also clause 16.1(a) of the *Standard Instructions - Goods or Services - Competitive Requirements 2003 (2017-04-27)*, incorporated by reference into the RFP through Section 2.1 thereof, which provided that, in conducting its evaluation of the bids, the government institution "may, but will have no obligation to", *inter alia*, "seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation".

8. RFP, Annex A1, Mandatory Technical Requirements; see also RFP, Annex A, Statement of Requirement, Hydraulic Motor.

satisfy these requirements. Bidder further confirms that all technical requirements have been thoroughly reviewed at (sic) that bidder fully complies with these requirements.<sup>9</sup>

[14] In addition, DSS Marine completed the table in the RFP with respect to each mandatory requirement. With respect to item No. 14, it provided the following comment:

Boom reel is furnished with a hydraulic hose set of 10m length to connect the reel to the hydraulic power unit. Hose consists of 3/8" R2 hydraulic hoses with 3/8" TEMA 3821/3811 hydraulic quick connections.<sup>10</sup>

## POSITIONS OF THE PARTIES

[15] DSS Marine submitted that its bid satisfied item No. 14. DSS Marine argued that PWGSC should have sought clarifications concerning the number of hoses that it offered to supply rather than assuming that its "set" of "hydraulic hoses" may not include three hoses. DSS Marine added in this respect that it did not take any exception to item No. 14 and that it certified that its bid met all the technical requirements (i.e. including the required three hoses). DSS Marine argued that it would have been prudent for PWGSC to request a clarification of the number of hoses in its "set" rather than making an assumption that its set may not contain three hoses, and that a more reasonable assumption would have been for PWGSC to assume that DSS Marine's bid met the technical requirement.

[16] DSS Marine also argued that PWGSC may have misread the reference to "R2 hydraulic hoses" [emphasis added] in its bid as an indication that its boom reel would only include two, rather than three, hoses. DSS Marine noted that "R2" is a technical standard for a type of hydraulic hose.

[17] PWGSC argued that DSS Marine's allegations are without merit. PWGSC argued that DSS Marine failed to provide any information in its bid documentation indicating that its proposed boom reel system was equipped with the required number of hydraulic hoses and that, on that basis, the DND technical evaluation team determined that DSS Marine's bid was non-compliant. PWGSC argued that the government institution was not required to seek clarification. PWGSC added that, consistent with prior Tribunal decisions, in the absence of evidence in the bid regarding the number of hoses that DSS Marine would supply, the evaluation team could not engage in speculation or simply assume that DSS Marine's proposed boom reel was in fact equipped with three hydraulic hoses.

## ANALYSIS

[18] 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.

[19] 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. In this case, the RFP notice stated that the solicitation was subject to the provisions of the *Canadian Free Trade*

---

9. DSS Marine's bid, Complaint and Exhibit 5 to the GIR, p. 83.

10. *Ibid.*



*Agreement (CFTA)*, the *World Trade Organization Agreement on Government Procurement (AGP)*, the *North American Free Trade Agreement (NAFTA)* and the *Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*.<sup>11</sup>

[20] In essence, the issue before the Tribunal is whether PWGSC and the DND team of evaluators failed to properly evaluate DSS Marine's bid by considering that it failed to meet mandatory technical requirement item No. 14 and by not seeking clarification from DSS Marine concerning the number of hydraulic hoses that it proposed to supply.

[21] The trade agreements cited above require that, to be considered for contract award, a tender must conform to the essential requirements set out in the tender documentation. They also require that procuring entities award contracts in accordance with the criteria and essential requirements specified in the tender documentation.<sup>12</sup>

[22] As noted above, the RFP provided that the bids would be assessed against the various mandatory technical requirements, including item No. 14, and called for the award of the contract to the compliant bid with the lowest price.

[23] The evidence on record shows that DSS Marine's bid was determined to be non-compliant because, while item No. 14 required the supply of three hydraulic hoses, there was no mention in DSS Marine's bid of the number of hoses contained in the boom reel systems that DSS Marine offered to supply.<sup>13</sup>

[24] As noted above, DSS Marine's bid referred to a "set consist[ing] of 3/8" R2 hydraulic hoses" without explicitly specifying the number of hoses in the set. DSS Marine's bid did, however, contain a statement that its offer met all the mandatory technical requirements set out in the RFP. In light of this statement, and assuming that they applied a similar approach to the evaluation of all bids, the Tribunal considers that it would not have been unreasonable for the evaluators to read into DSS Marine's offer an implicit indication that its "set" contained the required three hoses.

- 
11. *Canadian Free Trade Agreement*, online: Internal Trade Secretariat <<https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>> (entered into force 1 July 2017); *Revised Agreement on Government Procurement*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> (entered into force 6 April 2014); *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, online: Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 January 1994); *Canada-European Union Comprehensive Economic and Trade Agreement*, online: Global Affairs Canada <<http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (entered into force provisionally 21 September 2017) [*CETA*].
  12. Article 515(4) of the *CFTA* provides as follows: "To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation." Article 515(5) provides as follows: "[T]he procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted: (a) the most advantageous tender; or (b) if price is the sole criterion, the lowest price." Article 1015(4) of *NAFTA*, Article XIII(4) of the *AGP* and Articles 19.14(4) and (5) of *CETA* impose essentially the same obligations.
  13. Confidential Exhibits 3 and 4 to the GIR.

[25] That said, the Tribunal accords a large measure of deference to evaluators in their evaluation of proposals.<sup>14</sup> In addition, the Tribunal has held that the onus lies on the bidder to exercise due diligence in the preparation of its bid to ensure that the bid is compliant with the requirements of the solicitation, and to ensure that its bid is unambiguous and properly understood by PWGSC.<sup>15</sup> It was therefore for DSS Marine to exercise the necessary care in the drafting of its proposal to ensure that it was unambiguous in its demonstration that it met all the mandatory requirements.

[26] Also of relevance to the present case, while it would have taken little effort on the part of the evaluators to confirm that the set of hoses in the complainant's bid contained the required number, the RFP contained a specific notice informing prospective bidders that PWGSC was not obliged to seek clarifications on their bids.

[27] Taking the foregoing into account, and in light of DSS Marine's failure to explicitly state in its bid that its set would contain three hoses, the Tribunal considers that it was not unreasonable for PWGSC to conclude that DSS Marine's bid was not compliant with item No. 14. The Tribunal further considers that, in the circumstances of the present case, PWGSC was under no obligation to first seek clarifications from DSS Marine as to how many hoses it proposed to supply before reaching this conclusion.

[28] The Tribunal stresses, however, that it reaches this result in view of the deference that is properly accorded to evaluators in assessing the conformity of bids. The evaluators' determination of the conformity of DSS Marine's bid with item No. 14 fell within a permissible range of interpretation; the opposite conclusion would also have fallen within that range of permissible outcomes.

[29] Finally, the Tribunal notes that the information on the record does not support DSS Marine's suggestion that the evaluation team may have misread the reference to "R2" hoses in its bids as an indication that DSS Marine proposed to supply two hydraulic hoses as part of its boom reel systems.

[30] In summary, the Tribunal finds that DSS Marine did not demonstrate that PWGSC's evaluation of the conformity of DSS Marine's bid with item No. 14 concerning the provision of three hydraulic hoses was unreasonable. On this basis, the Tribunal finds that DSS Marine's complaint is not valid.

---

14. In *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CIIT) at para. 58, the Tribunal explained that "it will interfere only with an evaluation that is unreasonable and will substitute its judgment for that of the evaluators only when 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. In addition, the Tribunal has previously indicated that a government entity's determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether the Tribunal itself finds that explanation compelling."

15. See, for example, *Raymond Chabot Grant Thornton Consulting Inc. and PricewaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CIIT); *Integrated Procurement Technologies Inc.* (14 April 2008), PR-2008-007 (CIIT) at para. 13; *Tri-Tech Forensics Inc.* (19 March 2018), PR-2017-064 (CIIT) at para. 20; *BRC Business Enterprises Ltd. v. Department of Public Works and Government Services* (27 September 2010), PR-2010-012 (CIIT) at para. 51.

**COSTS**

[31] PWGSC requested that it be awarded its costs.

[32] The Tribunal's determination in this case rests on its conclusion that it was not unreasonable for the evaluators to determine that DSS Marine's bid did not comply with item No. 14. However, as indicated above, the Tribunal considers that it would also have been reasonable for PWGSC to find that DSS Marine's bid did in fact conform to item No. 14.

[33] For this reason, in the specific circumstances of this case, the Tribunal considers it appropriate that each party bear its own costs. Therefore, no costs will be awarded in this matter.

**DETERMINATION**

[34] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. No costs shall be awarded to either party.

Peter Burn

---

Peter Burn

Presiding Member