



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2018-019

Rescue 7 Inc.

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Wednesday, October 31, 2018*

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IN THE MATTER OF a complaint filed by Rescue 7 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**

**RESCUE 7 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.

The Canadian International Trade Tribunal determines that it will not award costs in this matter.

Randolph W. Heggart

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Randolph W. Heggart

Presiding Member

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## STATEMENT OF REASONS

[1] On August 7, 2018, Rescue 7 Inc. (Rescue 7) 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> regarding a Request for Proposals (RFP) (Solicitation No. 47419-188627B) issued by the Department of Public Works and Government Services (PWGSC)<sup>2</sup> on behalf of the Canada Border Services Agency (CBSA) for the provision of 285 automated external defibrillators (AED).<sup>3</sup>

[2] On August 8, 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>4</sup>

[3] Having inquired into the complaint, the Tribunal finds that the complaint is not valid, for the reasons that follow.

## SUMMARY OF COMPLAINT

[4] Rescue 7 alleged that PWGSC erred in awarding the contract to BERN Consulting Ltd. (BERN) as it was a non-compliant bidder. In particular, Rescue 7 submitted that it had reason to believe that the bilingual AED unit proposed by BERN could not meet both the mandatory bilingual requirement and the mandatory weight specification set out in the RFP.

[5] As a remedy, Rescue 7 requested that a new solicitation for the designated contract be issued or that the bids be re-evaluated.

## PROCUREMENT PROCESS

[6] On May 24, 2018, PWGSC issued the RFP. Two amendments were subsequently released on June 18 and 29, 2018. Amendment No. 001 confirmed that the weight requirement was mandatory and that heavier AEDs would not be considered for contract award. It also confirmed that the units delivered under the contract must meet all the mandatory requirements and evaluation criteria. Amendment No. 002 is not relevant to this case.

[7] On July 4, 2018, the RFP closed. Four bids were received, including one from Rescue 7 and two from BERN.

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1. R.S.C. 1985, c. 47 (4th Supp.) [*CITT Act*].
  2. On November 4, 2015, the Government of Canada gave notice that the name of the Department of Public Works and Government Services Canada will be changed to Public Services and Procurement Canada.
  3. Rescue 7 initially filed a deficient complaint on August 1, 2018. On August 7, 2018, Rescue 7 filed additional information further to a request made by the Tribunal on August 3, 2018, pursuant to subsection 30.12(2) of the *CITT Act*. Therefore, in accordance with rule 96(1)(b) of the *Canadian International Trade Tribunal Rules*, SOR/91-499 [*Rules*], and subsection 30.11(2) of the *CITT Act*, the complaint is considered to have been filed on August 7, 2018.
  4. SOR/93-602 [*Regulations*].

[8] The CBSA Technical Authority completed the technical evaluation on July 12, 2018. All four bids received were deemed compliant.

[9] On July 26, 2018, PWGSC advised Rescue 7 that the contract had been awarded to BERRN as the responsive bid with the lowest evaluated price. On the same day, PWGSC provided Rescue 7 with a debriefing phone call. During its debriefing, Rescue 7 asked PWGSC which AED unit had been proposed in BERRN's winning proposal. PWGSC refused to provide this information, stating only that the winning proposal was technically compliant.

## **PROCEEDINGS OF THE COMPLAINT**

[10] On August 7, 2018, Rescue 7 filed the present complaint with the Tribunal.

[11] On August 8, 2018, the Tribunal informed the parties that the complaint had been accepted for inquiry.

[12] On August 28, 2018, PWGSC filed its Government Institution Report (GIR) with the Tribunal in accordance with section 103 of the *Rules*.

[13] That same day, Rescue 7 sent two e-mails to PWGSC (copying the Tribunal) disputing that the AED proposed by BERRN was compliant with the mandatory requirements of the RFP. Other than being copied on these e-mails, the Tribunal received no comments on the GIR from Rescue 7.

[14] Given that the information on the record was sufficient to determine the merits of the complaint, the Tribunal decided that an oral hearing was not necessary and ruled on the complaint based on the written record.

## **POSITIONS OF THE PARTIES**

[15] In its complaint to the Tribunal, Rescue 7 submitted that it had reason to believe that the AED unit proposed by BERRN in its winning proposal could not meet both the bilingual requirement and the mandatory weight specification set out in the RFP.

[16] Rescue 7 submitted that there were only two fully bilingual AED units approved by Health Canada that allowed the user to choose the language of operation at the point of rescue, in accordance with item 5 of Part 2.1 of the RFP: the Physio-Control CR2 and the Cardiac Science G5. Rescue 7 believed that BERRN submitted the Cardiac Science AED in its proposal. According to the technical specifications for the Cardiac Science Powerheart<sup>®</sup> G5 submitted by Rescue 7, the weight of this AED is 5.7 pounds, including battery and pads.<sup>5</sup> It would thus be non-compliant with item 6 of Part 2.1 of the RFP.

[17] In its GIR, PWGSC indicated that the AED proposed by BERRN is the Philips HeartStart FR3 and that it was fully compliant with the mandatory terms of the RFP. Specifically, PWGSC noted that this AED is licensed by Health Canada as a medical device and meets the mandatory bilingual operation capability requirement as well as the mandatory weight requirement. As such, PWGSC submitted that the evaluators reasonably assessed BERRN's proposal as fully compliant with the mandatory requirements of the RFP.

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5. See Exhibit PR-2018-019-01 at p. 65 of 74, Vol. 1.

[18] As noted above, in an e-mail to PWGSC, Rescue 7 asserts that this AED does not meet the weight requirement and is not bilingual, but did not submit supporting information to the Tribunal in this regard.

## RELEVANT PROVISIONS OF THE RFP

[19] Subsection 4.2 of the RFP refers to clause A0031T of the *Standard Acquisition Clauses and Conditions Manual*, which provides that “[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.”

[20] Part 1 to Annex A of the RFP stated the requirements as follows:

Canada Border Services Agency has a requirement for the supply of 285 Automated External Defibrillators (AED), 113 AEDs must be bilingual (AED A) and 172 AEDs must be unilingual (AED B). The AED’s must meet all of the mandatory technical requirements as specified below and the mandatory evaluation criteria as specified at Part 2.1 - Mandatory Technical Evaluation Criteria.

...

### 1.1 Language Requirements specific to each AED:

#### AED A:

1.1a The AED must have bilingual operation capability and provide either audio or visual prompts or both and must be in a clear, calm voice in both French and English, allowing the user to choose the language of operation at the point of rescue;

...

### 1.2 General AED Requirements:

a. The AED must meet all applicable CSA or ULC standards and be licensed by Health Canada as a Medical Device;

...

i. The AED A and B, including battery, must weigh no more than 4.0 lbs;

...

[21] Part 2.1 – Mandatory Technical Evaluation Criteria to Annex A repeats these requirements as follows:

ITEM	CRITERIA	MUST BE PROVIDED TO SUBSTANTIATE	REFERENCE TO SUBSTANTIATION IN THE TECHNICAL BID

1.	Each AED unit must be licensed by Health Canada as a Medical Device (MDL).	The Bidder must provide a readable copy of license with its bid.	
...	...	...	...
5.	<p><b>Language Requirements</b></p> <p><b>Defib A:</b></p> <p>The AED must have bilingual operation capability and provide either audio or visual prompts or both and must be in a clear, calm voice in both French and English, allowing the user to choose the language of operation at the point of rescue.</p> <p>...</p>	The Bidder must provide proof that both Defib A and Defib B have the required language requirements.	<p><b>Defib A:</b></p> <p>...</p>
6.	The AED, including battery, must weigh no more than <b>4.0 lbs.</b>	The Bidder must provide proof that weight is 4.0lbs or less.	

## ANALYSIS

[22] 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.

[23] 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 case, are the *Revised Agreement on Government Procurement*,<sup>6</sup> the *North American Free Trade Agreement*,<sup>7</sup> the *Canada-European Union Comprehensive Economic and Trade Agreement*,<sup>8</sup> the

6. *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) [AGP].

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, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 1994) [NAFTA].



*Canadian Free Trade Agreement*,<sup>9</sup> the *Canada-Chile Free Trade Agreement*,<sup>10</sup> the *Canada-Peru Free Trade Agreement*,<sup>11</sup> the *Canada-Colombia Free Trade Agreement*,<sup>12</sup> the *Canada-Panama Free Trade Agreement*,<sup>13</sup> the *Canada-Honduras Free Trade Agreement*<sup>14</sup> and the *Canada-Korea Free Trade Agreement*.<sup>15</sup>

[24] The applicable trade agreements require that, to be considered for an award, a tender must, at the time of opening, comply with the essential requirements set out in the tender documentation, and that procuring entities must award contracts in accordance with the evaluation criteria specified in the tender documentation.<sup>16</sup>

[25] The Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals. In general, the Tribunal will only interfere with an evaluation that is unreasonable<sup>17</sup> 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.<sup>18</sup>

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8. *Canada-European Union Comprehensive Economic and Trade Agreement*, online: Global Affairs Canada <<http://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*].
  9. *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) [*CFTA*].
  10. *Canada-Chile Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng>> (entered into force 5 July 1997).
  11. *Canada-Peru Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/index.aspx?lang=eng>> (entered into force 1 August 2009).
  12. *Canada-Colombia Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng>> (entered into force 15 August 2011).
  13. *Canada-Panama Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng>> (entered into force 1 April 2013).
  14. *Canada-Honduras Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng>> (entered into force 1 October 2014).
  15. *Canada-Korea Free Trade Agreement*, online: Global Affairs Canada <<http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/index.aspx?lang=eng>> (entered into force 1 January 2015).
  16. See Articles XV(4) and (5) of the *AGP*; Article 1015(4) of *NAFTA*; Articles 19.14(4) and (5) of *CETA*; Articles 515(4) and (5) of the *CFTA*.
  17. As stated by the Tribunal in *Joint Venture of BMT Fleet Technology Ltd. and NOTRA Inc. v. Department of Public Works and Government Services* (5 November 2008), PR-2008-023 (CITT) at para. 25, the government institution's "determination will be considered reasonable if it is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling."; See also *Samson & Associates v. Department of Public Works and Government Services* (28 April 2015), PR-2014-050 (CITT) at para. 35.
  18. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33.

### **Is the Winning AED Bilingual?**

[26] As noted above, the RFP required a certain number of AEDs to have bilingual operation capability and provide either audio or visual prompts (or both) in a clear, calm voice in both French and English, allowing the user to choose the language of operation at the point of rescue.

[27] The Technical Reference Manual for the Philips HeartStart FR3 included in BERRN's bid indicates that this device has bilingual capability through the use of language cards and proper software.<sup>19</sup> BERRN's confidential bid documentation filed by PWGSC and reviewed by the Tribunal shows that its bid was indeed compliant with this requirement.<sup>20</sup>

[28] Rescue 7 has not submitted any evidence or specific argument to contradict the information provided by PWGSC.

### **Does the Winning AED Weigh Less Than 4.0 Pounds?**

[29] The RFP required the AEDs, including their batteries, to weigh no more than 4 pounds. The Technical Reference Manual for the Philips HeartStart FR3 included in BERRN's bid indicates that its proposed AED weighs 3 pounds 8 ounces, with the batteries included, well below the required 4 pounds.<sup>21</sup>

[30] Rescue 7 has not provided any supporting information to challenge this evidence.

### **Conclusion of the Complaint Analysis**

[31] The Tribunal finds that the evaluators acted in a reasonable manner when determining that the proposal submitted by BERRN was compliant with the mandatory requirements of the RFP. The evidence shows that the proposed AED has bilingual capability and weighs less than 4 pounds. As such, the Tribunal finds Rescue 7's complaint to be not valid.

### **COSTS**

[32] PWGSC requested its costs in responding to the complaint.

[33] Although PWGSC did not breach the applicable trade agreements, the Tribunal finds that PWGSC could have been more forthcoming in responding to Rescue 7's request for details about the make and model of the winning AED during the debriefing.

[34] PWGSC indicated to Rescue 7 that it could not discuss the details of the winning bidder's proposal. The Tribunal acknowledges that there are certain elements of a winning bidder's proposal that can be properly characterized as confidential. For example, a bidder's financial proposal is almost always considered confidential in this context. In addition, generally speaking, proprietary technical specifications are confidential, particularly if disclosure would expose that bidder's trade secrets.

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19. See Exhibit PR-2018-019-09A (protected) at 16-17 (Exhibit 4), Vol. 2.

20. *Ibid.* at 8 (Exhibit 4).

21. Exhibit PR-2018-019-09 at para. 30, p. 14 of 17, Vol. 1. See also Exhibit PR-2018-019-09A (protected) at Exhibit 4, Vol. 1.

[35] However, in this case, BERRN was proposing a third-party, off-the-shelf item. The contracting authority knew or should have known that disclosing this information to Rescue 7 would not have compromised the bidder. Or, if PWGSC had concerns about disclosing this information, it could have first verified this with BERRN. Had PWGSC provided the model of the winning AED, Rescue 7 may not have felt the need to file the present complaint. As it stands, PWGSC provided the very information sought by Rescue 7 in its public GIR.<sup>22</sup>

[36] For these reasons, the Tribunal determines that each party should bear its own costs.

#### **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] The Tribunal determines that it will not award costs in this matter.

Randolph W. Heggart  
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Randolph W. Heggart  
Presiding Member

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22. Exhibit PR-2018-019-09 at para. 23, Vol. 1.