



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2018-020

Sunny Jaura d.b.a. Jaura
Enterprises

v.

Department of Foreign Affairs,
Trade and Development

*Determination and reasons issued
Wednesday, November 21, 2018*

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IN THE MATTER OF a complaint filed by Sunny Jaura d.b.a. Jaura Enterprises 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

SUNNY JAURA d.b.a. JAURA ENTERPRISES

Complainant

AND

**THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND
DEVELOPMENT**

**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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Foreign Affairs, Trade and Development re-evaluate the technical proposal of the other bidder found to be compliant with the RFP in order to determine whether it is compliant based *only* on the information submitted (and not on the basis of additional material accessible online). After this re-evaluation is completed, if the other bidder is determined to be compliant, no compensation will be awarded to Jaura Enterprises. However, if as a result of the re-evaluation, it is determined that the only bidder compliant with the terms of the RFP was Jaura Enterprises, Jaura Enterprises is entitled to be compensated for the profit that it would reasonably have made if it had been awarded the contract.

In the latter circumstance, should the parties be unable to agree on the amount of lost profits, Jaura Enterprises shall file with the Canadian International Trade Tribunal, within 40 days of the date it receives written notice of the results of the re-evaluation, a submission on the issue of compensation. The Department of Foreign Affairs, Trade and Development will then have seven working days after receipt of Jaura Enterprise's submission to file a response. Jaura Enterprises will then have five working days after the receipt of the Department of Foreign Affairs, Trade and Development's reply submission to file any additional comments. The parties are required to serve each other and file with the Canadian International Trade Tribunal.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Sunny Jaura d.b.a. Jaura Enterprises its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by the Department of Foreign Affairs, Trade and Development. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the cost award is \$1,150. If any party disagrees with the preliminary indication of the cost award, it may make submissions to the *Canadian International Trade Tribunal*, as contemplated in Article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Rose Ann Ritcey

Rose Ann Ritcey

Presiding Member

Tribunal Panel: Rose Ann Ritcey, Presiding Member

Support Staff: Elysia Van Zeyl, Counsel

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STATEMENT OF REASONS

SUMMARY OF COMPLAINT

[1] On August 9 and 13, 2018, Sunny Jaura d.b.a. Jaura Enterprises (Jaura) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Proposal (RFP) (Solicitation No. 19-145012-PRMNY-MG) by the Department of Foreign Affairs, Trade and Development (DFATD) for hotel accommodation.

[2] Jaura alleged that DFATD wrongly determined that the winning bid, submitted by Sonder Inc. (Sonder), was consistent with the requirements of the RFP, specifically mandatory technical requirement MT5. MT5 required each hotel room to meet the requirements specified in Annex A: Statement of Work (SOW).² Specifically, Jaura alleged that Sonder's bid could not have complied with the requirements in the SOW that each room must include in the room rate (1) housekeeping/cleaning services and (2) at least one telephone with local calls included. Jaura also alleged that Sonder was unfairly allowed to offer "apartment" accommodations, while the solicitation was limited to supplying "hotel" accommodations.

[3] As a remedy, Jaura requested that the contract with Sonder be cancelled and the bids be re-evaluated in accordance with the terms of the RFP. Jaura also requested compensation for lost profit and opportunity.

BACKGROUND ON SOLICITATION

[4] On July 4, 2018, DFATD issued a Notice of Proposed Procurement for the provision of hotel accommodation from September 4, 2018, to December 24, 2018, for temporary staff in support of the United Nations General Assembly of 2018, which was to be held in New York.

[5] On July 11, 2018, DFATD issued Amendment 1 to answer questions of bidders and to amend the dates of stay in respect of some of the rooms requested.³

[6] On July 18, 2018, DFATD issued Amendment 2 to answer further questions from bidders and to amend the requirements with regard to security.⁴

[7] On July 23, 2018, the solicitation closed with five bidders having submitted proposals, including one by Sonder and one by Jaura. DFATD set aside one of the bids on the basis that it did not meet certain solicitation requirements, and forwarded the remaining four technical bids (including those of Sonder and Jaura) to the DFATD Technical Evaluation Team. The evaluation team consisted of three DFATD officials with the Consulate General of Canada in New York.

[8] On July 25, 2018, the technical evaluation was conducted in two stages. The first stage was an initial evaluation of each bid by each evaluator on a separate basis, and the second was a subsequent consensus meeting to reach a consensus evaluation with respect to each bid. The

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. Exhibit PR-2018-020-10, Vol. 1, Attachment 1.
3. *Ibid.*, Attachment 2.
4. *Ibid.*, Attachment 3.

evaluation team determined on a consensus basis that three of the four bids, including those of both Sonder and Jaura, were consistent with the technical requirements set out in the RFP.⁵

[9] On July 26, 2018, the evaluation team conveyed results of the consensus evaluation to DFATD.⁶ DFATD then conducted the financial evaluation of the three compliant bids and determined that the bid submitted by Sonder had the lowest evaluated price. In the GIR, DFATD notes that the price submitted in Jaura's bid was the most expensive by a considerable margin.⁷

[10] On July 26, 2018, DFATD wrote to Sonder to confirm the availability and pricing of the required accommodations, noting that Sonder's bid had referenced dates in the RFP. After receiving confirmation from Sonder, on July 27, 2018, DFATD subsequently advised Sonder that its bid was successful and had been recommended for award of the contract.⁸

[11] On August 2, 2018, Sonder sent to DFATD a draft lease which indicated that housekeeping would take place twice per month/bi-weekly. The draft lease did not include in-room telephone service among listed utilities included.⁹

[12] On August 6, 2018, DFATD contacted Sonder to confirm the agreement details regarding housekeeping, requesting to modify the agreement to stipulate bi-weekly cleanings and adjust the total price accordingly. The same day, Sonder responded that it would include bi-weekly cleanings in the final agreement, which resulted in an additional \$4 to the room rate.¹⁰

[13] On August 7, 2018, DFATD advised Jaura that it was not the successful bidder and that the contract had been awarded to Sonder as the compliant bidder with the lowest evaluated price.¹¹

[14] On August 8, 2018, Jaura contacted DFATD, objecting to the award of the contract to Sonder.¹²

[15] On August 9, 2018, DFATD contacted Sonder to confirm that all provided rooms would include a telephone with free local calls included in the room rate. The same day, Sonder confirmed that this was correct, stating that the telephones were not yet installed but would be by the start of the lease.¹³ The same day, DFATD submits that it held a telephone debrief with Jaura at the latter's request, and advised Jaura that Sonder would be providing installed telephones with local calls in the rooms as required by the SOW.

[16] As indicated above, Jaura filed a complaint with the Tribunal with respect to this process on August 9, 2018. Further documentation required for the complaint to be considered filed was submitted by Jaura on August 13, 2018.

5. Exhibit PR-2018-020-10A (protected), Vol. 2, Attachment 4.

6. Exhibit PR-2018-020-10A (protected), Vol. 2, Attachment 6.

7. Exhibit PR-2018-020-10, Vol. 1 at para. 13; Exhibit PR-2018-020-10A (protected), Vol. 2 at 19.

8. Exhibit PR-2018-020-10A (protected), Vol. 2, Attachments 8-9.

9. *Ibid.*, Attachment 10.

10. *Ibid.*, Attachment 10.

11. Exhibit PR-2018-020-10, Vol. 1 at para. 17 and Attachment 11.

12. *Ibid.*, Attachment 12.

13. Exhibit PR-2018-020-10A (protected), Vol. 2, Attachment 10.

RELEVANT PROVISIONS OF THE RFP

[17] Part 2.4.6 of the RFP states that:

[u]nless specified otherwise in the RFP, Canada will evaluate only the documentation provided with a Bidder's proposal. Canada will not evaluate information such as references to Web site addresses where additional information can be found, or technical manuals or brochures not submitted with the proposal.¹⁴

[18] Part 3.2 of the RFP states requirements applicable to the bidders' technical proposals, including the following:

The Bidder *must provide the necessary documentation to support compliance* with the requirements as stated in Annex A – Statement of Work

...

For Mandatory Technical Criteria below, the Bidder and its proposed resource(s) must *demonstrate* compliance with all the criteria.¹⁵

[Emphasis added]

[19] Annex A of the RFP contains the SOW, which lists several criteria that rooms supplied by bidders had to meet, including the two criteria that are in issue in this complaint, namely:

3. All rooms must have housekeeping/cleaning services included in the room rate.
4. All rooms must contain at least one (1) telephone with local calls included in the room rate.

POSITIONS OF THE PARTIES

[20] As explained above, Jaura claimed that Sonder's bid did not comply with the above criteria. In particular, according to Jaura, the rooms offered by Sonder would not have included telephones with local calls or housekeeping services within the room rate. DFATD argued that Jaura's allegations have no merit.

ANALYSIS

[21] As has been stated time and time again by this Tribunal, the Tribunal affords a large measure of deference to evaluators. In general, the Tribunal will only interfere with an evaluation that is unreasonable, i.e., where the evaluators have ignored vital information, wrongly interpreted the scope of a requirement, acted in a procedurally unfair way or based their evaluation on undisclosed criteria.¹⁶

14. Exhibit PR-2018-020-10, Vol. 1, Attachment 1.

15. Exhibit PR-2018-020-10, Vol. 1, Attachment 1.

16. *Vantage Painting Ltd. v. Department of Public Works and Government Services* (5 March 2018), PR-2017-042 (CIIT) at para. 28; *Samson & Associates v. Department of Public Works and Government Services*, (13 April

[22] However, in this case, as discussed in further detail below, the Tribunal finds that the evaluators' conclusions in regard to the telephone and housekeeping requirements do not withstand a reasonableness test.

Telephones

[23] Jaura alleged that Sonder does not offer telephones in its rental units, as required by the SOW. Furthermore, Jaura's allegation is partly based on its interactions with Sonder through email. DFATD pointed out that, in the email exchange of August 8, 2018, Sonder informed Jaura that it did not offer telephones in the units, but that "if you absolutely need telephones I could make that happen".¹⁷

[24] In response, DFATD submitted that the last page of Sonder's bid document consisted of a photograph of a sample Sonder apartment room that showed an installed telephone in the room.¹⁸

[25] DFATD also referred to *DSS Marine*, where the Tribunal stated that, in certain contexts and so long as the same approach was applied to the evaluation of all bids, it may be reasonable for evaluators to read an ambiguous term in a bid as an implicit indication of compliance.¹⁹ However, the Tribunal in *DSS Marine* also determined that the evaluators in that case had acted reasonably in refusing to read in such compliance. Overall, determining the latitude for evaluators to interpret ambiguous terms in bids as demonstrating (or failing to demonstrate) compliance is a fact-specific analysis of the specific terms of the solicitation documents and bids in question.

[26] It may have been open to evaluators to have concluded, based on the presence of a telephone in one of the photographs provided with Sonder's bid, that the rooms offered by Sonder were equipped with phones. However, the Tribunal must point out that this part of MT5 required more than simply the provision of telephones in the rental units.

[27] Rather, the RFP required that local calls be included in the room rate. The Tribunal is of the view that it was unreasonable for the evaluators to imply, based on the mere physical presence of the phone in a photograph, that local calls were included in the room rate. The physical presence of the phone indicates nothing of the charges, if any, that arise from the usage of that phone.

[28] The fact that Sonder confirmed that local calls were included, *after* the contract was awarded, does not remedy this obvious deficiency in Sonder's bid. Moreover, given the obligation reflected in Part 3.2 of the RFP, which requires bidders to "demonstrate" compliance, it was unreasonable for DFATD to have "read in" compliance with the requirement that the room rate include local calls.

Housekeeping

[29] Jaura alleged that Sonder's bid was not compliant with the requirement in the SOW that "all rooms must have housekeeping/cleaning services included in the room rate". Jaura argued that,

2015), PR-2014-050 (CITT) at para. 35; *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 33.

17. Exhibit PR-2018-020-01, Vol. 1 at 44.

18. Exhibit PR-2018-020-10A (protected), Vol. 2, Attachment 13.

19. *DSS Marine Inc. v. Department of Public Works and Government Services* (15 August 2018), PR-2018-005 (CITT) at para. 24.

because the room rate is a daily rate, housekeeping services included in the room rate must also be on a daily basis. In response, DFATD points out that the RFP did not specify a required frequency for room cleaning. Sonder's bid contained a link to its website in support of its compliance with the SOW, which stated that monthly cleanings and utilities (electricity, water) were included.²⁰ Furthermore, in Jaura's email exchange with Sonder, Sonder advised that "you get 1 cleaning per 30 days. Additional cleaning is \$100 per clean."²¹

[30] In the Tribunal's view, the frequency of the cleanings is a secondary issue. The primary issue is that there was nothing in Sonder's bid from which evaluators could reasonably infer that cleaning was included in the room rate. The conclusion that housekeeping services were included in the rate could only be reached by evaluators after having consulted Sonder's website.

[31] Again, section 2.4.6 of the RFP makes it abundantly clear that DFATD was to evaluate the proposals based only on the documentation actually submitted and that it would not include in its evaluation materials referenced on external websites.

[32] Accordingly, in taking into account materials that were included only on Sonder's website and that had not been submitted with its proposal, DFATD violated the terms of the RFP in conducting its evaluation. Accordingly, the evaluators acted unreasonably.

"Hotel" vs. "Apartment" Accommodation

[33] Jaura argued that the RFP stated a requirement for "hotel" accommodations, and that Sonder's bid instead offered "apartment" housing, rather than hotel accommodations. In support of this, Jaura refers to its email exchange with Sonder of August 8, 2018, wherein Sonder title itself as a "deconstructed hotel" because they "do not own the bricks", instead leasing property from the property owners with permission to lease units back out on a short-term basis.²²

[34] In response, DFATD referred to Amendment 1 to the RFP, which advised bidders that DFATD had a "strong preference for one bedroom apartments". Furthermore, in a separate email from Sonder to Jaura on August 8, 2018, Sonder indicated that "local governments label us as a hotel in which we have to pay the "hotel tax" and follow the rules. . . . We operate above board in all municipalities to avoid fines and a bad reputation."²³

[35] The Tribunal finds that this ground of complaint is not valid. In the Tribunal's view, it does not matter whether the accommodations offered by Sonder were "hotel" accommodations or apartment-style accommodations; because the RFP and Amendment 1 to the RFP make it clear that either are acceptable, provided that they comply with the technical requirements.

CONCLUSION

[36] In light of the foregoing, the Tribunal finds that the complaint is valid.

20. Exhibit PR-2018-020-10A (protected), Vol. 2, Attachment 13 at 55; Exhibit PR-2018-020-10, Vol. 1, Attachment 14.

21. Exhibit PR-2018-020-01, Vol. 1 at 44.

22. Exhibit PR-2018-020-01, Vol. 1 at 45.

23. *Ibid.*

[37] The deficiencies identified in this process bring into question the accuracy of other bidders' evaluations. The Tribunal understands from the GIR that there is only one bidder, other than Sonder and Jaura, who was found by evaluators to be compliant with the terms of the RFP. The Tribunal recommends that this bidder's proposal be re-evaluated. In doing so, evaluators should exercise care to ensure that the evaluation of the bid is based only on the information actually submitted, and not with reference to external documents, websites or the like.²⁴ Evaluators should also exercise care to ensure that the bidder has complied with the requirements to "demonstrate" that the technical criteria are met.

[38] If the result of this re-evaluation is that the other bidder's proposal continues to be compliant, having been determined by evaluators not to have been impacted by the errors referred to above in respect of Sonder's bid, then Jaura will not be entitled to compensation for lost profit. The Tribunal is of the view that this remedy is appropriate and reasonable because, based on its pricing, Jaura would only have been the successful bidder if the second-ranked bidder was found to be non-compliant.

[39] However, to the extent that evaluators determine that the other bidder's proposal is non-complaint, Jaura, being the only complaint bidder in such a scenario, will be entitled to compensation for its lost profits.

[40] Accordingly, pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that DFATD re-evaluate the technical proposal of the other bidder found to be compliant with the RFP in order to determine whether it is compliant based *only* on the information submitted (and not on the basis of additional material accessible online). After this re-evaluation is completed, if the other bidder is determined to be compliant, no compensation will be awarded to Jaura. However, if as a result of the re-evaluation, it is determined that the only bidder compliant with the terms of the RFP was Jaura, Jaura is entitled to be compensated for the profit that it would reasonably have made if it had been awarded the contract.

COSTS

[41] Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Jaura its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by DFATD. In accordance with the *Procurement Costs Guideline*, the Tribunal's preliminary indication of the cost award is \$1,150. If any party disagrees with the preliminary indication of the cost award, it may make submissions to the Tribunal, as contemplated in Article 4.2 of the *Procurement Costs Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Rose Ann Ritcey

Rose Ann Ritcey

24. For greater certainty, the Tribunal's view is that it is unnecessary to re-evaluate Jaura's bid as it does not suffer from the same deficiencies (reliance on links) as Sonder's bid.

Presiding Member