



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2018-034

Valley Associates Global Security
Corporation

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Wednesday, December 19, 2018*

TABLE OF CONTENTS

DETERMINATION	i
STATEMENT OF REASONS	1
INTRODUCTION	1
BACKGROUND	1
RELEVANT TERMS OF THE RFSO	1
POSITIONS OF THE PARTIES	3
Valley's Position	3
PWGSC's Position.....	3
ANALYSIS	3
PWGSC reasonably concluded that Valley did not submit its Notice of Compliance.....	4
PWGSC reasonably concluded that Valley submitted a sample that did not have a multi-curve shape	5
Conclusion	7
COSTS.....	7
DETERMINATION	7

IN THE MATTER OF a complaint filed by Valley Associates Global Security Corporation 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

VALLEY ASSOCIATES GLOBAL SECURITY CORPORATION

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 this complaint is not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in preparing and proceeding with this complaint, which costs are to be paid by Valley Associates Global Security Corporation. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the amount of the cost award is \$1,150.

Randolph W. Heggart

Randolph W. Heggart

Presiding Member

Tribunal Panel:	Randolph W. Heggart, Presiding Member
Support Staff:	Anja Grabundzija, Counsel Laura Colella, Counsel
Complainant:	Valley Associates Global Security Corporation
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Ian McLeod Roy Chamoun Kathryn Hamill

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

STATEMENT OF REASONS

INTRODUCTION

[1] Valley Associates Global Security Corporation (Valley) filed this complaint with the Canadian International Trade Tribunal (the Tribunal) on September 28, 2018, pursuant to a procurement process issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Royal Canadian Mounted Police (RCMP) for a Request for Standing Offer (RFSO) (Solicitation No. M7594-186822/A) for the provision of general duty rifle plates (rifle plates) for RCMP members.

[2] On August 30, 2018, PWGSC notified Valley that the samples it submitted in support of its bid were deemed “unacceptable” by the technical authority, on the following basis:

The pre-award sample, Plate, Rifle, General Duty, set of 2 ShotStop Ballistics model D1581SSB, received from Valley Associates Global Security Corporation, August 14, 2018, has been evaluated and the following is noted.

...

The following deviations are noted:

1. The U.S. Department of Justice Notice of Compliance with NIJ 0101.06 for the model provided was not submitted. Refer to section 4.1.1.1 of the Request for Proposal.
2. The plate has a single curve. The plate must have a multi-curve shape. Refer to paragraph 3.2 of the specification.

In view of the aforementioned deviations, the pre-award sample is unacceptable; therefore, this contract shall not be placed with this firm.

[3] Valley alleges that it did include the NIJ Notice of Compliance as per the requirements of the RFSO and that its samples did have a multi-curve shape. As such, it submits that it was unreasonable for PWGSC to deem its bid non-compliant with the mandatory requirements of the RFSO.

BACKGROUND

[4] The RFSO was issued on April 30, 2018. Five amendments were made between May 16, 2018, and June 6, 2018, and the solicitation closed on June 13, 2018.

[5] On August 30, 2018, the results were conveyed to Valley and it was informed that its bid did not meet the essential requirements of the RFSO. In addition to the technical criteria not being met, PWGSC noted that Valley’s financial bid was considerably higher than the winning bidder’s proposal.

[6] The contract was awarded on September 21, 2018, to M.D. Charlton.

RELEVANT TERMS OF THE RFSO

[7] Section 4.1.1.1 of the RFSO reads as follows:

4.1.1.1 Mandatory Technical Criteria

A) Pre-Award Sample(s) and Supporting Documentation

As part of the technical evaluation, to confirm an Offeror's capability of meeting the technical requirements (in accordance with specification number G.S. 1045-330C, dated (2018-01-05) two (2) pre-award samples of the item below will be required from offerors after the offer closing date, upon written request from the Standing Offer Authority. . . .

The Offeror must ensure that the required pre-award samples are manufactured in accordance with the technical requirement and [are] fully representative of the offer submitted. Rejection of the pre-award samples will result in the offer being declared non-responsive.

. . .

Supporting Documentation

a. The U.S Department of Justice Notice of Compliance with NIJ Standard – 0101.06 for the model provided is required.

. . .

B) SUBMISSION OF PRE-AWARD SAMPLE AND SUPPORTING DOCUMENTATION

(i) The Offeror will be advised when the pre-award sample and supporting documentation are required.

. . .

(iv) Rejection of the pre-award samples and supporting documentation will result in the offer being declared non-responsive.

. . .

[8] The RFSO document also included in the Annex a reference document titled "Specification – Plate, Rifle, General Duty" by the RCMP, which included the following relevant provisions:

3.2 Design – The Plate, Rifle, General Duty must be a *multi-curve shape* with shooter's cut (angled top corners), made of a hard ceramic composite material with suitable ballistic backing material, capable of providing protection against armour-piercing-type steel-cored rifle bullets. The plates are designed to protect a limited part of the torso against penetration and severe blunt trauma effects generated by small calibre ball and armour piercing projectiles.

[Emphasis added]

POSITIONS OF THE PARTIES

Valley's Position

[9] Valley's position that PWGSC acted unreasonably in the evaluation of its bid can be summarized as follows:

- The RFSO requirement to provide a "U.S. Department of Justice Notice of Compliance with NIJ Standard – 0101.06 for the model provided" was complied with by providing links to the NIJ Compliant Products List page.
- Valley's proposal was rejected on the basis that its rifle plate samples were a single-curve model, but the samples were multi-curve, as shown in its supporting documentation.

PWGSC's Position

[10] PWGSC's position in respect of this complaint is that Valley did not meet the mandatory requirements outlined in the RFSO:

- Valley did not provide a copy of its Notice of Compliance 0101.06 for the proposed rifle plate and provided instead a link to the NIJ Compliant Products List. PWGSC also submits that the RFSO specified that information submitted by website reference would not be evaluated.
- Valley did not propose a rifle plate that had a multi-curve shape.
- Valley did not submit a pre-award sample of its proposed rifle plate that was fully representative of its proposal.

ANALYSIS

[11] Subsection 30.14(1) of the *Canadian International Trade Tribunal Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint.¹ 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. Section 11 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements and their provisions.²

[12] In this case, the trade agreements require procuring entities to evaluate bids in accordance with the criteria set out in the tender documents. In particular, the *Canadian Free Trade Agreement* provides that, "[t]o be considered for an award, a tender shall . . . at the time of opening, comply with the essential requirements set out in the . . . tender documentation . . ." (Article 515(4)).

[13] The Tribunal is typically deferential to evaluators in their evaluation decisions, and will normally only intervene if the evaluation is unreasonable, such as where the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a

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

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

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.³

[14] To that end, the Tribunal must consider two issues arising from Valley's complaint:

- Was it reasonable for PWGSC to determine that Valley did not respond to the requirements of section 4.1.1.1 of the RFSO pertaining to the Notice of Compliance?
- Was it reasonable for PWGSC and the Technical Authority to deem the rifle plates submitted by Valley as single-curve, thus rendering them non-compliant with the terms of the RFSO, which required multi-curve plates?

PWGSC reasonably concluded that Valley did not submit its Notice of Compliance

[15] In its bid, Valley provided a website link to the NIJ's Compliant Product List to satisfy the requirement to provide a Notice of Compliance. Under the heading "NIJ 0101.06 Compliance", the bid also included a table setting out certain model numbers, as well as some other information, including a column titled "model status". No further information or context was provided as to the origin or purported meaning of this table.

[16] According to Valley, it inquired with the NIJ about this criterion and was informed that this requirement of a Notice of Compliance was new and that not all manufacturers would have received these letters. Valley alleges that the NIJ was backlogged, presumably explaining why it did not produce the Notice of Compliance, but provided no further evidence to support this claim.

[17] To defend its position that the website link it provided was sufficient, Valley alleges that, even if it had produced a Notice of Compliance letter, it would include the website link which the Technical Authority would have to visit to verify its status, given that the certificate does not guarantee that the product remains compliant. Valley also suggests that the requirement was unclear in that it did not clearly specify that a letter had to be submitted.

[18] The Tribunal finds that the requirement in section 4.1.1.1 of the RFSO was clear that some form of supporting documentation demonstrating compliance with the NIJ Standard 0101.06 was required. While the RFSO does not specify the form of the documentation, it appears that a letter was an acceptable form of certification.

[19] Furthermore, through reference to Standard Instructions for bidders the RFSO⁴ also specified as follows:

Unless specified otherwise in the RFSO, Canada will evaluate only the documentation provided with an offeror's offer. *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 offer.*

3. See e.g. *Gallason Industrial Cleaning Services Inc. v. Department of Public Works and Government Services* (15 August 2018), PR-2018-002 (CITT) at para. 31.

4. See the 2006 (2017/04/27) *Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements*, which were incorporated by reference into and formed part of the RFSO, per section 2.1 of the RFSO.

[Emphasis added]

[20] There was no evidence submitted to the Tribunal demonstrating that Valley sought to clarify what would be acceptable evidence that the criterion was met. Instead, Valley submitted a bid purporting to demonstrate compliance with section 4.1.1.1 by inviting the evaluators to visit a website.

[21] The Tribunal finds that, having regard to the RFSO criteria, the evaluators reasonably concluded that Valley's bid was non-compliant in this respect.

[22] While government institutions must evaluate bids thoroughly and carefully, the onus is on bidders to make sure that the bid is clear and complies with the mandatory criteria of the solicitation – including by making sure that all their supporting documentation is included with their bid, as required, and clearly demonstrates compliance. Ultimately, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and capable of being properly understood by the evaluators.⁵ This includes the obligation to fully understand and follow the instructions and requirements of a solicitation.

[23] In light of the RFSO criteria and instructions, it should have been clear to Valley that demonstrating compliance by inviting evaluators to visit a website would not be acceptable. Nevertheless, to the extent that Valley argues that the RFSO requirements were unclear, or otherwise unreasonable, this should have been apparent to it on the face of the solicitation. Therefore, the time to seek clarification, if necessary, or to object to such purportedly unreasonable criteria was when it first became aware of them or to raise the objection in accordance with the timelines for making objections or filing complaints set out in section 6 of the *Regulations*. It was also incumbent on Valley to ensure that it understood the RFSO criteria prior to submitting its bid, so as to ensure that its bid was fully compliant. Valley failed to do this in this case.

[24] PWGSC's assessment that Valley's proposal was not compliant in that it did not provide the Notice of Compliance required by criterion 4.1.1.1 was reasonable and consistent with the information in the tender documents. It should be noted that Valley's proposal could have been rejected on this ground alone.

PWGSC reasonably concluded that Valley submitted a sample that did not have a multi-curve shape

[25] The product model number identified in section 2.1 of Valley's Technical Bid is identified as D1581SSBCA. Section 2.2 of its bid specifies that the product is a multi-curve rifle plate.

[26] According to the GIR, the evaluators noted that, in its Technical Bid, Valley identified the proposed product as being produced by ShotStop and bearing model No. D1581SSBCA, while in the pre-award sample phase, it identified the submitted samples as a different product. The submitted rifle plate was identified on the back as model D1581SSB. Further, during its visual evaluation, the RCMP technical evaluators found that the rifle plate was not in a multi-curve shape.

[27] As mentioned earlier, Valley identified the D1581SSBCA product as having a multi-curve shape in its Technical Bid and it submitted with its bid the technical brochure for the identified product. When Valley submitted its plate at the pre-award phase, it did not submit supporting documentation about the technical points of the submitted plate, though it appears that, at some point, the Technical Authority visited the ShopStop website to retrieve the technical brochure for the sample submitted. On the website it found a technical brochure for plate D1581SSB, which described it as a single-curve plate.

[28] With respect to PWGSC's claim that the Technical bid presented model D1581SSBCA and that the pre-award sample displayed model number D1581SSB, Valley suggests that this was simply a cosmetic error:

The rifle plate model proposed is the D1581 which is a certified multi-curve plate per the NIJ compliance list. The SSB is a designation for the manufacturer "Shot Stop Ballistics" and the CA reflects a Canadian end-user. All documentation submitted included the D1581SSBCA. The plate samples submitted apparently stated D1581SSB which was a cosmetic error.

[29] While the Tribunal is somewhat troubled that the Technical Authority searched the manufacturer's website for additional information relating to the uncertainty regarding the submitted samples, the search was perhaps conducted out of an abundance of caution given the confusion caused by the bidder's alleged "cosmetic error". Given that the information found was not contained in Valley's bid nor submitted with its samples, the Tribunal cautions that this search had the potential of being problematic should Valley have ultimately been declared either responsive or non-responsive based on information found on the website.

[30] In any event, the evidence indicates that the visual inspection alone was sufficient for the evaluators to determine that the plate was single-curve.

[31] Furthermore, it is apparent that Valley's bid and its subsequent pre-award sample submission contained enough ambiguity that it would have required the Technical Authority to speculate as to the difference in the models and as to what model was actually being proposed.

[32] The RFSO, at section 4.1.1.1 A) required the pre-award sample to be "representative of the offer submitted". As outlined above, Valley's bid suffered from various inconsistencies and unclear elements. The Tribunal recalls once again that the onus is on a bidder to ensure that its bid is clear:

Finally, the Tribunal has also been clear that bidders bear the onus of demonstrating that their bids meet the mandatory criteria of a solicitation. In other words, bidders bear the responsibility of "connecting the dots" – they must take care to ensure that any and all supporting documentation in their bids clearly demonstrates compliance. As such, while the Tribunal has encouraged evaluators to resist making assumptions about a bid,⁶ ultimately, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and properly understood by the evaluators.⁷

6. *Tritech Group Ltd. v. Department of Public Works and Government Services* (31 March 2014), PR-2013-035 (CITT) at para. 38

7. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT); *Samson & Associates v. Department of Public Works and Government Services* (19 October 2012), PR-2012-012 (CITT) at para. 28;

[33] As such, the Tribunal finds that PWGSC reasonably concluded that the samples submitted by Valley could not be accepted, and properly rejected its bid.

Conclusion

[34] For the reasons above, the Tribunal concludes that the complaint is not valid.

COSTS

[35] Pursuant to section 30.16 of the *CITT Act*, the Tribunal may award costs of, and incidental to, any procurement complaint proceedings.

[36] As the successful party, PWGSC is entitled to reasonable costs.

[37] In determining the amount of cost award for this complaint, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

[38] The procurement here was not complex and neither was the complaint, which consisted in two straightforward grounds of complaint. The proceedings were not complicated and the Tribunal was able to complete its inquiry in the standard 90-day framework.

[39] Given the above, the appropriate level of complexity is determined to be Level 1.

[40] As such, and in accordance with Appendix A of the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,150.

DETERMINATION

[41] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

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

Randolph W. Heggart

Randolph W. Heggart
Presiding Member