



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2018-060

8146292 Canada Inc.

*Decision made
Wednesday, February 6, 2019*

*Decision issued
Thursday, February 7, 2019*

*Reasons issued
Monday, February 18, 2019*

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

8146292 CANADA INC.

AGAINST

THE DEPARTMENT OF NATIONAL DEFENCE

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.

Rose Ann Ritcey

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Presiding Member

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.

BACKGROUND

[2] This complaint concerns a Request for Proposal (RFP) (Solicitation No. W8482-194718/A) issued by the Department of National Defence (DND) on September 12, 2018, for the provision of a cleaning compound.

[3] On October 19, 2018, 8146292 Canada Inc. submitted a bid in response to the solicitation and received notification that it was not successful on January 2, 2019. That same day, 8146292 Canada Inc. filed an objection with DND and received denial of relief in a letter dated January 21, 2019.

[4] In its complaint, 8146292 Canada Inc. submits that its bid was not evaluated fairly in that it was incorrectly deemed non-compliant with the terms of the RFP with respect to the size of the container for the cleaning compound, outlined in Annex C of the RFP:

CLEANER AND INHIBITOR. GAS TURBINE COMPRESSOR CLEANER. 25 LITRES.³

[5] According to 8146292 Canada Inc., it offered the correct container size.

ANALYSIS

[6] On February 6, 2019, the Tribunal decided not to conduct an inquiry into the complaint, pursuant to subsection 30.13(1) of the *CITT Act*.

[7] Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may conduct an inquiry into a complaint if the following conditions are met:

- a. the complaint has been filed within the time limits prescribed by section 6;⁴
- b. the complainant is a potential supplier;⁵
- c. the complaint is in respect of a designated contract;⁶ and

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

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

3. https://buyandsell.gc.ca/cds/public/2018/09/12/7b31e05c989e69503e5622ab82ad352d/rfp_-_w8482-194718a_-_en.pdf.

4. Subsection 6(1) of the *Regulations*.

5. Paragraph 7(1)(a) of the *Regulations*.

- d. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.⁷

[8] In this case, the Tribunal has determined that the complaint does not disclose a reasonable indication that the government institution failed to conduct the procurement in accordance with the applicable trade agreements.

[9] On January 2, 2019, DND informed 8146292 Canada Inc. that its bid was unsuccessful because its proposed alternative part, i.e. a 20-litre container, did not meet “fit, form, and function” as specified in Annex C, which required a 25-litre container.⁸

[10] On January 2, 2019, 8146292 Canada Inc. wrote to DND to object. On January 8, 2019, 8146292 Canada Inc. filed a complaint with the Tribunal (PR-2018-056), which the Tribunal determined on January 9, 2019, was premature because 8146292 Canada Inc. had not yet received denial of relief.⁹

[11] On January 21 and 22, 2019, DND responded to 8146292 Canada Inc.’s objection.¹⁰

[12] In its complaint, 8146292 Canada Inc. submits that its Financial Offer clearly showed that it was compliant with the criterion. With respect to information contained in the Technical Bid, 8146292 Canada Inc. states that the 20-litre container “serves only as one of the various standard packagings on the manufacturer’s [technical] data sheet.”¹¹

[13] A careful review of 8146292 Canada Inc.’s Technical Bid confirms that the *only* information with respect to container size is found in the manufacturer’s information attached to the bid. Under a heading identified as “packaging”, there is mention of 20-litre, 200-litre or 1000-litre cans. The container size was not mentioned in any other part of 8146292 Canada Inc.’s Technical Bid, despite it being an essential criterion of the RFP. Further, in its complaint, 8146292 Canada Inc. does not indicate where in its *Technical Bid* the correct container size was offered.

[14] Section 3.1 of the RFP, under “Bid Preparation”, outlined the three sections required for bids: the Technical Bid, the Financial Bid and Certifications.

[15] Section 4.2 of the RFP reads:

A bid must comply with the requirements of the bid solicitation and meet all mandatory technical criteria to be declared responsive.

[16] In view of these provisions, when DND determined that 8146292 Canada Inc.’s Technical Bid was non-compliant with respect to the mandatory criterion for the size of the container, the

6. Paragraph 7(1)(b) of the *Regulations*.

7. Paragraph 7(1)(c) of the *Regulations*.

8. Complaint package, page 16 of 86.

9. 8146292 Canada Inc. (9 January 2019), PR-2018-056 (CITT).

10. Exhibit 01C, Volume 2, pages 2 and 3.

11. Exhibit 01E, Volume 1, page 7.

evaluators did not consider the Financial Bid, which does include a reference to the correct container size.¹²

[17] With respect to 8146292 Canada Inc.'s argument that DND ought to have sought clarification, the Tribunal draws attention to section 4.1.1.2(g)(i) of the RFP which reads:

. . . (Note: it is the responsibility of the Bidder to include all information required to evaluate equivalency as described above; however, all bidders acknowledge that Canada will have the right, but not the obligation, to request any additional information during the evaluation that it requires to make a determination regarding equivalency).

[18] The Standard Instructions, incorporated by reference in this RFP, also specify that DND could, but had no obligation to, “seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation.”¹³

[19] As such, it is clear that DND was under no duty to seek clarifications from bidders.

[20] The Tribunal has often said that it is incumbent upon a bidder to exercise due diligence in the preparation of its proposal to make sure that it is compliant with all the essential elements of a solicitation.¹⁴ The Tribunal has also said 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,¹⁵ 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.¹⁶

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12. 8146292 Canada Inc. filed several documents with its complaint that appear to form its Financial Bid. The documents refer to both a 25-litre container and a 27-litre container. While 8146292 Canada Inc. explains the discrepancy in size in its complaint before the Tribunal, this explanation does not seem to have been provided in its bid.
 13. 2013 (2017-04-27) Standard Instructions – Goods or Services – Competitive Requirements, section 16 (2008-05-12), 1(a).
 14. *Tektronix Canada Inc.* (20 November 2015), PR-2015-041 (CITT); *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT) at para. 13.
 15. *Tritech Group Ltd. v. Department of Public Works and Government Services* (31 March 2014), PR-2013-035 (CITT) at para. 38.
 16. *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; *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 (CITT) at para. 37.

[21] Conversely, it is the duty of the government institution to ensure that it evaluates bids thoroughly and strictly to ensure that it complies with the mandatory requirements identified in the solicitation documents.¹⁷

[22] In this case, 8146292 Canada Inc. did not exercise due diligence in the preparation of its proposal to make sure that it demonstrated that it clearly complied with all the essential elements of the solicitation. In particular, 8146292 Canada Inc. failed to ensure that its Technical Bid demonstrated compliance with the mandatory criterion for size of package. DND was under an obligation to evaluate bids thoroughly and strictly for compliance with the mandatory criteria in the RFP. As such, the complaint before the Tribunal discloses no reasonable indication that DND conducted an unreasonable evaluation.

[23] Finally, with respect to 8146292 Canada Inc.'s arguments regarding the further non-compliant elements included in the January 21, 2019, letter it received from DND, the Tribunal will not assess those given its finding that the complaint does not disclose a reasonable indication that DND failed to conduct the evaluation consistent with the trade agreements when it concluded that 8146292 Canada Inc.'s bid was non-compliant with terms of the RFP regarding container size.

DECISION

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

Rose Ann Ritcey

Rose Ann Ritcey

Presiding Member

17. *Integrated Procurement Technologies, Inc.* (14 April 2008), PR-2008-007 (CITT); *Bell Canada* (26 September 2011), PR-2011-031 (CITT).